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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1097

EVANS REAMER & MACHINE COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

RICHARD F. STEVENS,
1950 Union Commerce Building,
Cleveland, Ohio,
Attorney for Petitioner.

Of Counsel:
HERBERT A. SPRING,
VICTOR STRIMBU, JR.,
DAVID J. STRAUSS.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

EVANS REAMER & MACHINE COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Evans Reamer & Machine Company, plaintiff below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in this case on November 9, 1967. A copy of the opinion of the Court of Claims, ____ F. 2d ____ (not published yet) is printed in the Appendix hereto.

OPINION BELOW.

The opinion of the Court of Claims (Appendix to the Petition, pp. 1a-61a) is reported at ____ F. 2d ____ (1967).

JURISDICTION.

The judgment of the United States Court of Claims was entered into November 9, 1967.

The jurisdiction of the Supreme Court is invoked under 28 U. S. C. § 1255(1).

STATUTE AND REGULATIONS INVOLVED.

The statutory provision involved is Title II of the First War Powers Act (50 U. S. C., APP. 611). The regulations involved are ASPR 3-219.5(a), 32 CFR 3.219.5(a) 1954); ASPR 1-802, 32 CFR 1.802 (1967); ASPR 1-803(a)(1), 32 CFR 1.803(a)(1)(1967); ASPR 3-219.4 (c), 32 CFR 3.219-4(c)(1954); ASPR 1-302.4, 32 CFR 1.302.4 (1954); APP 30-404.

QUESTIONS PRESENTED.

1. Is a contracting officer obligated to disclose during the course of contract negotiations information solely in his possession regarding changes in circumstances affecting the represented price paid to another contractor where under set-aside regulations the price under both procurements was inter-related; or are contractors required to negotiate set-aside contracts at their peril?

2. Whether a contractor is entitled to reformation of its contract where a contractor's mistake as to his legal rights was induced by the misrepresentations, innocent or otherwise, of a Government contracting officer on whose knowledge Petitioner had a right to rely.

3. Whether pertinent Armed Services Procurement Regulations dealing with set-aside contracts for economically depressed areas prohibit the granting of a unit price in the basic set-aside contract that exceeds the award price of the non-set-aside contract despite the fact that the material provisions of the set-aside contract differ substantially from those of the non-set-aside contract.

STATEMENT OF THE CASE.

Sometime in 1953, responsibility for designing and developing a fire bomb to meet specifications of, and for use by the Air Corps and for procuring and delivering a substantial quantity of such fire bombs, was assigned to the Chemical Corps. The Chemical Corps in turn assigned procurement responsibility for the fire bomb to its New York Chemical Procurement District. On or about May 14, 1954, that Procurement District issued an Invitation for Bids (IFB) for the manufacture and supply of 73,944 fire bombs on the basis of both F.O.B. origin and F.O.B. destination.

The invitation contained a note indicating that a "set-aside" procurement might be negotiated with firms located in labor surplus areas in accordance with pertinent provisions of the Armed Services Procurement Regulations. (ASPR.) Any bidder desiring to participate in such negotiations was invited to attach to its bid on the non-set-aside portion of the procurement a supplemental letter furnishing data as to its eligibility to negotiate for the potential set-aside portion. (App. 2a-3a, Opinion.)

The Petitioner was one of more than 50 bidders who responded to the IFB. Its manufacturing plant was located in Perry Court, Ohio, a coal mining area where chronic unemployment had existed for many years. Petitioner attached to its competitive bid a statement indicating its interest in, and eligibility for, negotiations on any set-aside portion of the fire bomb procurement. (App. 3a, Opinion.)

The contract for the non-set-aside portion of the procurement was awarded to The Aircraftsmen Company (Aircraftsmen) in late June, 1954. It called for the manufacture and delivery of 73,944 fire bombs at a delivery rate (after the first two months of production) of 8,000 bombs per month. (App. 4a, Opinion.) The original award

prices per bomb were $73.98 and $77.98 F.O.B. origin and destination respectively. However, a pre-award survey team had discovered a $2.056 error in Aircraftsmen's bid and, after the contract had been awarded, Aircraftsmen filed a mistake-in-bid claim with the General Accounting Office (GAO) requesting a price increase of $2.056 per bomb. In October, 1954, GAO approved Aircraftsmen's mistake-in-bid claim and the prices per bomb were increased to $76.036 and $79.836 F.O.B. origin and destination respectively.

Petitioner was the only bidder who was eligible to negotiate for a set-aside procurement of the fire bombs. The contracting officer responsible for the fire bomb procurement sent a letter to Petitioner under date of July 20, 1954 inviting Petitioner to bid on a set-aside quantity of 71,661 bombs with monthly deliveries commencing in April, 1955. In the letter, the contracting officer stated that set-aside procurements could be negotiated at prices no higher than those paid on the non-set-aside portion and advised Petitioner that the award to Aircraftsmen had been made at $73.98 per bomb F.O.B. origin. Petitioner rejected the invitation. (App. 4a-5a, Opinion.)

Shortly thereafter, the contracting officer, at the direction of his commanding officer, asked representatives of Petitioner whether the Company would be interested in negotiations if the maximum price were set at $76.036. The Court found that Petitioner's representatives told the contracting officer that Petitioner could not meet the $76.036 price either but then reconsidered their decision and informed the contracting officer that Petitioner was interested in negotiating for the set-aside portion of the fire bomb procurement. (App. 5a-6a, Opinion.) In the belief that negotiations with Petitioner had been terminated when Petitioner's representatives stated Petition-

er could not meet the $76.036 price per bomb, the contracting officer refused to negotiate with Petitioner. The decision of the contracting officer was appealed to the commanding General, Army Chemical Corps, Materiel Command. (MATCOM.)

After Petitioner had sent letters to the contracting officer offering to perform the contract at the $76.036 price per bomb, MATCOM directed the contracting officer to inquire as to whether the terms and conditions set forth in Petitioner's letters would apply to a production rate of 3,000 bombs per month. Petitioner answered in the affirmative. MATCOM then directed the contracting officer to continue negotiations with Petitioner and the contracting officer informed Petitioner by letter dated October 15, 1954 that he had been authorized to re-enter into negotiations for a contract at the optimum production rate of 3,000 bombs per month. (App. 6a, Opinion.) The production rate for the non-set-aside contract remained at 8,000 bombs per month. (App. 6a, Opinion.)

A series of negotiation conferences followed during which Petitioner's representatives vigorously pressed for an increase in the $76.036 price or consent to the inclusion in the contract of an escalation clause on material prices. The contracting officer consistently maintained that existing ASPR governing set-aside procurements did not permit him to consider any unit price in the basic contract in excess of Aircraftsmen's contract price. Petitioner's representatives contended that Aircraftsmen's contract price was no longer controlling because of the fact that the Government had reduced the production rate of 8,000 per month in Aircraftsmen's contract to 3,000 per month for the set-aside procurement. (App. 7a-8a, Opinion.)

In the interest of providing work for the persons in its critically distressed area, Petitioner stated it would

accept the Government's conditions if they were mandatory and not susceptible to revision. Petitioner continued to urge the Government to allow it an increase over the $76.036 price. Negotiations continued on the contract into February, 1955. (App. 7a-8a, Opinion.)

Meanwhile, Aircraftsmen was experiencing substantial difficulties in manufacturing and delivering fire bombs. In late January, 1955, representatives of Aircraftsmen called the contracting officer and informed him that increases in the price of aluminum could affect Aircraftsmen disastrously if an aluminum price escalation clause was not included in its contract. On January 31, 1955, Aircraftsmen wrote the contracting officer and requested the inclusion of an aluminum price escalation clause in its contract.

In early February, 1955, the contracting officer visited Aircraftsmen's plant in Los Angeles to discuss the problems confronting Aircraftsmen. This visit was undertaken after the New York Procurement District personnel had reviewed the Aircraftsmen situation at a staff meeting with representatives of the Company. On February 11, 1955, Aircraftsmen wrote the contracting officer and formally requested a progress payments program. Aircraftsmen included in said letter a financial statement showing it had been unable to pay approximately two-thirds of the expenses which it had incurred in the performance of its contract. (App. 46a-47a, Opinion.)

On February 15, 1955, the contracting officer responded to Aircraftsmen's letter of January 31, 1955 requesting an aluminum escalation clause. He inquired whether Aircraftsmen desired its request to be considered as a claim under Section 30, Part IV of the Army Procurement Regulations (APP.) and, if so, he suggested that Aircraftsmen should elaborate its claim on appropriate forms,

copies of which he offered to furnish. By a letter marked "Air Mail" and dated February 23, 1955, Aircraftsmen advised the contracting officer that it did desire its request for an aluminum escalation clause to be treated as a claim under Section 30, Part IV of APP and attached thereto its application for relief with supporting documentation. The letter was date stamped as having been received by the contracting officer on March 2, 1955. The Court below found there was no satisfactory evidence in the record to explain the reason for the lengthy time lapse except the possibility that the documents may have been hand carried. (App. Opinion, 48a.)

Petitioner executed its contract with the Government on February 28, 1955. The contracting officer had never disclosed to Petitioner that Aircraftsmen was encountering production difficulties nor that Aircraftsmen was encountering severe financial problems in the performance of the non-set-aside contract and had requested financial relief. Petitioner entered into the performance of its contract and despite financial losses suffered in producing the fire bombs, delivered the last of the fire bombs to the Government in March 1958.

Aircraftsmen suffered losses also and submitted claims for relief under Title II of the First War Powers Act (50 U. S. C. App. Sec. 611). On October 3, 1955, the contracting officer submitted a favorable preliminary recommendation certifying that Aircraftsmen's financial distress was caused by a number of factors, namely: (a) an original underestimation of costs; (b) lack of extensive working capital to carry a contract of such magnitude during shutdown periods necessitated by change orders; and (c) failure to anticipate a rising market in a basic commodity. (App. 50a, Opinion.) On October 17, 1955, Aircraftsmen was granted an increase in the price

per bomb to $87.9391 retroactive to the first bomb produced. Despite the relief it obtained, Aircraftsmen was unable to meet its delivery schedule and the Government terminated Aircraftsmen's contract in March, 1956. (App. 50a-51a, Opinion.)

Petitioner sought relief under Title II, First War Powers Act, in October, 1956. The Army Contract Adjustment Board denied Petitioner's application in June, 1957 stating that it was unable to find that the current productive capacity of Petitioner and its parent company, Lempco Products, Inc., would be substantially impaired as a result of the losses suffered. Petitioner requested the Board to reconsider its decision on December 11, 1957. The Board denied the request for reconsideration on March 25, 1958. (App. 53a-54a, Opinion.)

Petitioner initiated the present case against the United States in the Court of Claims, contending: (1) that the contracting officer's intentional concealment of information material to the negotiations which was solely in his possession constituted actual fraud which misled Petitioner to its detriment and, thus, Petitioner was entitled to reformation of its contract; (2) that assuming the contracting officer's failure to disclose information material to the negotiations was not intentional, then such failure constituted constructive fraud, and thus, Petitioner was entitled to the relief sought in its Petition; (3) that the parties entered into the basic contract under a mutual mistake of fact; (4) that the contracting officer violated the standards of fair play and good faith and knowingly took an unconscionable advantage of the inferior bargaining position of Petitioner, and, therefore, Petitioner was entitled to the relief sought in its Petition; and (5) that the contracting officer, by insisting that applicable regulations prohibited his granting Petitioner a price per bomb in ex-

cess of the award price in the non-set-aside contract, erred in his interpretation of the applicable regulations, induced Petitioner mistakenly to believe it could not receive an increase in its unit price because of the reduced production rate in the set-aside contract and, thus, Petitioner was entitled to reformation of its contract.

Pursuant to Court of Claims Rule 53(a), Petitioner's case was referred to a Commissioner for action pursuant to Rule 52(b) of said Rules. On October 21, 1966, in compliance with Rule 57, the Commissioner filed his opinion which dismissed Petitioner's Petition.

The Commissioner rejected the first and second contentions stating that the most the record in this case could be said to support was that the contracting officer had become aware in a general way that Aircraftsmen was experiencing both production and financial difficulties in the performance of its contract and that the contracting officer had only surmises, not verified facts, as to the nature of Aircraftsmen's problems. The Commissioner said the contracting officer could not be charged with fraud, either actual or constructive, in failing to disclose facts which he did not actually know to be facts. (App. 17a-18a, Opinion.) The Commissioner rejected the third contention on the ground that the written contract precisely expressed the terms and conditions upon which both parties had agreed in their antecedent negotiations. (App. 15a, Opinion.)

The Commissioner did not expressly reject the fourth contention. Apparently, the fourth contention was not discussed because of the Commissioner's ruling on the first and second contentions. The Commissioner did not rule on Petitioner's fifth contention. (App. 13a-15a, Opinion.) The Commissioner merely noted that both par-

ties had persuasive arguments regarding the proper interpretation of the applicable regulations.

Petitioner filed Exceptions to the Commissioner's Report to the Court of Claims. In a per curiam opinion, Judge Nichols dissenting, the Court of Claims adopted the Commissioner's findings of fact, opinion and recommended conclusion of law.

Judge Nichols dissented on the basis that a ground rule had been established in the negotiations that the Government would not pay more than the Aircraftsmen price and Petitioner would not take less and that, under the circumstances of this case, the contracting officer was under a duty to warn Petitioner before its contract was executed by both parties if he entertained any expectation that the Aircraftsmen price might not hold firm. (App. 20a-21a, Opinion.) Judge Nichols further stated that:

> "* * * The commissioner says (in the opinion, not the findings) that before the award to plaintiff the contracting officer had 'only surmises, not verified facts, as to the nature of Aircraftsmen's problems * * *.' To sustain the result reached, it is vital that this characterization be correct. The commissioner had the officer before him as a witness, and no doubt was as well situated to look into the man's mind as triers of fact ever are. But I question whether any well advised contracting officer would throw out such a broad hint to a contractor to apply for the extraordinary relief, available only to contractors in grave enough difficulty, under Title II, as this one did on February 15, (Finding 30), because of troubles he merely surmised. Their letter to him of February 11, (Finding 29), I would hold of itself afforded more than surmise, disclosing as it did that they had been unable to pay approximately two-thirds of their expenses. I do not think 'surmise' is the *mot juste*, and if the commissioner had selected one more in accord with his detail

findings, the result might well have been different. I miss here the equitable approach of National Presto Industries, Inc. v. United States, 167 Ct. Cl. 749, 338 F.2d 99 (1964). If this case is not to go down in history as an instance of atavism in the evolution of law, it must be explained in the peculiar, and to me inexplicable, view the court and the commissioner take as to the ultimate facts." (App. 21a-22a, Opinion.)

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Claims enunciates a novel but nevertheless fundamental principle that during negotiations a contracting officer need not divulge to a contractor information in his possession which is relevant and material to the contract but which he has not verified as being accurate or true. The Court of Claims has said, in effect, that a contracting officer may be in sole possession of certain facts material to the negotiations for a contract which, if true, would most certainly affect the decision of the contractor to enter into a contract but need not make the contractor aware of said information until he has verified the accuracy of the information even though the contractor may, in the meantime, execute the contract and thus unwittingly plunge into an abyss from which there is no escape.

The Court of Claims did not even limit the above rule by requiring the contracting officer to suspend negotiations with the contractor until he investigated and ascertained whether the information was accurate or not. Thus, a contracting officer may, under the rule enunciated by the Court of Claims, wait until after a contractor with whom he is dealing executes his contract before ascertaining whether the information material to negotiations which came into his possession during negotiations is accurate. If the contract subsequently proves to be a ruinous one for

the contractor, the Government is absolved of all responsibility for failing to either divulge the information or suspend the negotiations until the information could be verified. The new rule actually encourages a contracting officer not to investigate and verify information in his possession which the contractor needs but would not have any way of obtaining.

The Court of Claims has for many years adhered to the rule that where the Government possesses vital information which it is aware a contractor needs but would not have, it cannot properly remain silent and betray a contractor into a ruinous course of action. *Albert & Harrison, Inc. v. United States,* 68 F.Supp. 732 (Ct. Cl. 1946); *Potashnick v. United States,* 105 F.Supp. 837 (Ct. Cl. 1952); *Ragonese v. United States,* 120 F.Supp. 768 (Ct. Cl. 1954); *Bateson-Stolte, Inc. v. United States,* 172 F. Supp. 454 (Ct. Cl. 1959); *Snyder-Lynch Motors, Inc. v. United States,* 292 F.2d 907 (Ct. Cl. 1961); *Helene Curtis Industries, Inc. v. United States,* 312 F.2d 774 (Ct. Cl. 1963); *National Presto Industries, Inc. v. United States,* 338 F.2d 99 (Ct. Cl. 1964); *Chernick v. United States,* 372 F.2d 492 (Ct. Cl. 1967); *Maxwell Dynamometer Company v. United States,* No. 120-62 _____ Ct. Cl. _____ (decided Nov. 9, 1967). Adherence to said rule is particularly important in cases such as the one at bar where the Government has asserted that the price per bomb to be paid to Petitioner could not exceed the price paid per bomb to Aircraftsmen.

The Court of Claims has now made a basic change in the long-established rule and has stated that during contract negotiations, the Government need not divulge vital information which it is aware a contractor needs but would not have, until after it has verified the information. Such a basic change in the law applicable to approximately

180 billion dollars in Government contracts per year ought not be made without any appellate review.

A rule of contract law followed for many decades and uniformly endorsed by the courts forms an unusually solid foundation for reliance by parties on the duties and obligations of one party to the other in government contract negotiations. The rule requiring the divulgence of vital information which the Government knows a contractor needs but would not have is such a rule. Petitioner believes that the new rule stated by the Court of Claims in this case is as wrong in principle as it will be upsetting in practice, for it clearly places contractors at the complete mercy of the Government procurement officials. At the very least, the new rule merits full consideration by the Court.

2. In 1954-55, the ASPR dealing with set-aside contracts prohibited the payment of a price differential to the contractor producing the set-aside portion of a procurement. (ASPR 3.219.5(a), 32 CFR 3.219.5(a) (1954).) While the ASPR just cited was deleted on October 9, 1959 by Amendment 47, 24 FR 8219, the pertinent language of that regulation has been incorporated into ASPR 1-802, 32 CFR 1.802 (1967); ASPR 1-803(a)(i), 32 CFR 1.803(a)(1) (1967). The aforesaid procurement regulations are set forth in full in the Appendix.

During the negotiations for a contract, the Government reduced the production rate, in Petitioner's contract, from 8,000 bombs per month to 3,000 bombs per month. The contract of the non-set-aside contractor, Aircraftsmen, was not changed. Petitioner requested an increase in the price to be paid per bomb or the inclusion of an escalation clause in its contract for the reduction in production rate greatly increased the time period within which the contract was to be performed and thus exposed Petitioner to

probable increases in cost of material and other increases in cost that Aircraftsmen would not have to contend with.

The contracting officer refused to grant Petitioner's requests stating in a forceful and unequivocal manner that the ASPR's dealing with "set-aside" contracts prohibited the granting of a unit price in the basic set-aside contract that would exceed the award price of the non-set-aside contract. Petitioner entered into a contract with the Government in reliance on the contracting officer's interpretation of the pertinent ASPR.

In the Court below, Petitioner contended that it was entitled to reformation of its contract because the contracting officer erred in his interpretation of the pertinent regulations and that Petitioner reasonably relied upon the representations of the contracting officer to its detriment. Petitioner contended that the prohibition in the regulations against a price differential was intended to apply only where all material provisions in the two contracts, the non-set-aside and the set-aside contracts, were the same.

The Trial Commissioner stated in his opinion, which was adopted by the Court below, that:

> "Whether the contracting officer was right or wrong in this interpretation of the set-aside regulations seems beside the point. Typically, the remedy of reformation is intended to give relief from a contract which does not conform to antecedent expressions on which the parties have agreed. It is not a proper remedy for the enforcement of terms to which the defendant never assented." (App. 13a-14a, Opinion.)

In so stating, the Trial Commissioner and the Court of Claims rejected Petitioner's argument that the proper rule of contract law in cases such as this is as follows:

"If the mistake of law that induced the making or the performance of a contract by one party was caused by a fraudulent misrepresentation of the law by the other, or by his innocent misrepresentation if the relations of the parties are such as to make it reasonable for the one to rely upon the representations of the other, the appropriate relief by rescission, restitution, or reformation will be given the injured party. * * *" 3 *Corbin*, Contracts § 618 (1960). See also: *Staten Island Hygeia Ice & Cold Storage Co. v. United States*, 85 F.2d 68, 71-72 (2d Cir. 1936).

The Court of Claims refused to decide whether the contracting officer's interpretation of the set-aside regulations was right or wrong on the ground that reformation was not the proper remedy even if he was wrong in his interpretation. One flaw in the Court of Claims' analysis is that there is a rule of contract law which *does* permit reformation of a contract in cases such as this. Petitioner submits that it is entitled to continued recognition of said rule of contract law.

Moreover, the decision of the Court of Claims has left unclear the proper interpretation of the set-aside regulations. The Government has asserted that the price to be paid per unit in a set-aside contract can never exceed the award price per unit in the non-set-aside contract regardless of the differences that may exist in the terms and conditions of the two contracts. Petitioner has stated this interpretation is erroneous. The Court of Claims found both positions persuasive.

In view of the Government's expressed policy of alleviating the plight of workers in economically depressed areas by placing set-aside contracts in said areas and the large number of Government contracts involved, it is vitally important that this issue be resolved. The unset-

tling consequences of the decision of the Court of Claims can only be forestalled by a decision of this Court finally resolving the question left unanswered below.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

RICHARD F. STEVENS,
Attorney for Petitioner.

Of Counsel:

HERBERT A. SPRING,
VICTOR STRIMBU, JR.,
DAVID J. STRAUSS.

February 1968.

APPENDIX

APPENDIX.

OPINION OF THE UNITED STATES COURT OF CLAIMS.

(Decided November 9, 1967.)

OPINION

PER CURIAM: This case was referred to Trial Commissioner Lloyd Fletcher with directions to make findings of fact and recommendation for conclusions of law. The commissioner has done so in an opinion and report filed on October 21, 1966. Exceptions to the commissioner's opinion and report were filed by plaintiff and the case has been submitted to the court on the briefs of the parties and oral argument of counsel. Since the court agrees with the commissioner's findings, opinion, and recommended conclusion of law, as hereinafter set forth, it hereby adopts the same as the basis for its judgment in this case.* Therefore, plaintiff is not entitled to recover and the petition is dismissed.

OPINION OF COMMISSIONER **

FLETCHER, *Commissioner*: In 1952 the Office of Defense Mobilization issued Defense Manpower Policy No. 4 (DMP-4) which had as its purpose:

> * * * procurement by negotiated contracts and purchases with responsible concerns which are in an area of current or imminent labor surplus * * * in cases where the public interest dictates the need for doing so . . .[1]

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* The dissenting opinion of NICHOLS, *Judge*, follows the opinion of the Trial Commissioner which has been adopted by the Court.

** The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 57 (a).

[1] Undated mimeographed release from Office of Defense Mobilization, p. 1 (ODM-3560). See the Appendix hereto where Defense Manpower Policy No. 4 and relevant statutes and regulations are reproduced for convenient reference.

Under this policy a system of so-called "set-asides" was introduced into Government procurement practice. A typical procurement would be split into two segments with a portion of the total purchase being awarded to the lowest responsible bidder, wherever located, and with the remainder being "set-aside" for negotiation with firms located in labor surplus areas. Although, originally, procuring agencies were authorized in such procurements to pay price differentials (see 31 Comp. Gen. 279), by November 1953 the policy had changed to the end that the contract price for the "set-aside" could not exceed the award price for the bid, or non-set-aside, portion of the procurement.[2]

The contract in dispute here arose out of such a "set-aside" procurement. During 1953 the Army Chemical Corps had designed and developed a new type of fire bomb for use by the Air Force. The casing for this bomb was made primarily of aluminum and resembled a cigar in shape with a length of 11 feet and a diameter of 18 inches. It was designed to contain 650 pounds of napalm, a jellied gasoline which will burn at high temperatures when ignited and is very difficult to extinguish.

The Chemical Corps assigned procurement responsibility for the fire bomb to its New York Chemical Procurement District. On May 14, 1954, the Procurement District issued its Invitation For Bids for the manufacture and supply of 73,944 fire bombs on the basis of both F.O.B.

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[2] 18 Fed. Reg. 6995 (1953). Section 644 of the Department of Defense Appropriation Act of 1954 provided that no appropriated funds could be used to pay a price differential on contracts made for the purpose of relieving economic dislocations. P.L. 179, 83d Cong., 1st Sess., approved August 1, 1953, 67 Stat. 357 (1953). The same proviso was continued in Section 733 of the Department of Defense Appropriation Act of 1955. P.L. 458, 83d Cong., 2d Sess., approved June 30, 1954, 68 Stat. 356 (1954). See Appendix hereto.

origin and F.O.B. destination. The invitation contained a note indicating that a "set-aside" procurement might be negotiated with firms located in labor surplus areas in accordance with pertinent provisions of the Armed Services Procurement Regulations (ASPR). Any bidder desiring to participate in such negotiations was invited to attach to its bid on the non-set-aside portion of the procurement a supplemental letter furnishing data as to its elegibility to negotiate for the potential set-aside portion.

The plaintiff, Evans Reamer & Machine Company (Evans), was one of more than 50 bidders who responded to the IFB. Its manufacturing plant was located in Perry County, Ohio, a coal mining area where chronic unemployment had existed for many years. Accordingly, Evans attached to its competitive bid a statement indicating its interest in, and eligibility for, negotiations on any set-aside portion of the fire bomb procurement.[3]

The bids were opened at the Procurement District's offices on June 15, 1954. The low bidder, by reason of an apparent mistake, was allowed to withdraw its bid. The next lowest bid was submitted by The Aircraftsmen Company (Aircraftsmen) at $73.98 per bomb, F.O.B. origin. Following, in order, were the bids of Evans' parent company, Lempco Products, Inc. (Lempco) at $87.40 F.O.B. origin, and of Evans itself at $87.65 F.O.B. origin.[4]

Defendant's contracting officer immediately dispatched pre-award survey teams to Aircraftsmen and Lempco for the purpose of ascertaining their respective

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[3] As of the time Evans submitted its bid, Perry County had not been formally classified by the Department of Labor as a so-called Group IV Area of Labor Surplus. However, Evans' application for such classification was then pending and on June 24, 1954, the Department of Labor formally classified Perry County as a Group IV area.

[4] The Government had estimated the cost of producing these fire bombs at $125 per bomb.

manufacturing and financial capabilities. Favorable survey reports were furnished by both teams. However, the survey team at Aircraftsmen discovered that, due to a mistake, Aircraftsmen's bid was $2.056 per bomb lower than it should have been. Notwithstanding, Aircraftsmen asked that it be awarded the contract at its erroneous bid price upon the mutual understanding that it would process a mistake-in-bid claim to the General Accounting Office (GAO) seeking a price increase of $2.056 per bomb.

The contract for the non-set-aside portion of the procurement was awarded to Aircraftsmen in late June 1954. It called for the manufacture and delivery of 73,944 fire bombs at a delivery rate (after the first two months of production) of 8,000 bombs per month. The original contract prices per bomb were $73.98 and $77.78 F.O.B. origin and destination, respectively, but when, in October, GAO approved Aircraftsmen's mistake-in-bid claim, those prices were increased, in keeping with the Procurement District's prior commitment, by $2.056 per bomb.

Meanwhile, it had developed that Evans was the only bidder who was eligible to negotiate for a set-aside procurement of the fire bombs.[5] A survey team dispatched to Evans' plant by the contracting officer reported favorably on Evans' financial and technical capacity to perform, subject to its obtaining a guarantee of financial support from its parent, Lempco. Thereupon, the contracting officer sent a letter to Evans under date of July 20, 1954, inviting Evans to quote on a set-aside quantity of 71,661 bombs with monthly deliveries commencing in April 1955. He referred specifically to ASPR 1-302.4 providing that

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[5] As required by ASPR 3-219.3, Evans' bid was within 120 percent of Aircraftsmen's low bid, and by the time of award to Aircraftsmen, the area of Evans' manufacturing facilities had been officially classified as a labor surplus area. See footnote 3, *supra*.

set-aside procurements could be negotiated at prices no higher than those paid on the non-set-aside portion, and advised Evans that the award under the non-set-aside portion had been made at $73.98 per bomb F.O.B. origin.

By return mail, Evans rejected "the opportunity of taking on" the set-aside because its basic manufacturing costs would exceed the proposed set-aside price of $73.98 and because, in addition, there was a strong probability of substantial increases in aluminum prices during the production period. Thereupon, the contracting officer consulted his commanding officer regarding further action on the procurement assignment. The latter decided that inquiry should be made of Evans as to whether it would be interested in negotiations if the maximum price were set at $76.036 on the assumption that Aircraftsmen's claim before GAO for an increase of $2.056 would be successful. The contracting officer immediately made such an inquiry of Evans' representatives by telephone but was told that Evans could not meet the $76.036 price either. In the belief that negotiations with Evans had thus terminated, the contracting officer commenced action leading to the issuance of another Invitation For Bids on the remaining quantity of fire bombs.[6]

A few days later Evans' chief negotiator reconsidered the matter and concluded that his rejection of the $76.036 price had been premature. He telephoned the contracting officer to advise him that Evans was interested in negotiating for the set-aside portion of the fire bomb procurement at any price allowed Aircraftsmen in excess of the $73.98 price. This advice was confirmed by telegrams and letters. Also, Evans' chief negotiator had a personal conference on the matter with the Commanding General,

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[6] The contracting officer intended to include Evans on the list of prospective bidders for this new invitation.

Army Chemical Corps, Materiel Command (MATCOM), which visit resulted in an order to the contracting officer to forward the file for appellate review by MATCOM.

In a letter to the contracting officer dated August 23, 1954, Evans had forwarded a cost breakdown and stated its willingness to accept a contract for the set-aside quantity of fire bombs at the Aircraftsmen's price of $73.98 subject to an increase of $2.056 if Aircraftsmen's claim to GAO were successful. The contracting officer forwarded the letter to MATCOM where the matter was under review.

At this point, a change in the delivery schedule set forth in the non-set-aside contract (8,000 bombs per month) was imported into the correspondence. Under instructions from MATCOM, the contracting officer on August 26 inquired of Evans whether the same "terms and conditions" contained in its letter of August 23 would apply to a production rate of 3,000 bombs per month. Evans replied on September 1:

> We are pleased to advise you that the terms and conditions contained in our letter of August 23, 1954, are applicable to a production rate of three thousand (3,000) bombs per month with deliveries to begin in April or May, 1955, as well as to the production rate originally specified.

On October 12, 1954, MATCOM instructed the Procurement District to continue negotiations with Evans for the set-aside quantity and to expedite those negotiations to the point of signing a formal contract. Three days later the contracting officer wrote Evans that he had been "authorized to re-enter into negotiations * * * under the terms of the labor surplus provisions of this bid, at an optimum production rate of 3,000 bombs per month, the deliveries commencing May 1955." He asked for Evans' cost breakdowns and other relevant data with a view to scheduling a preliminary conference.

A series of negotiation conferences followed, commencing with a first conference on October 26, 1954. By this time the Evans' official who had conducted previous negotiations with the Government had retired. His son, James J. Strnad, who was president of Lempco and vice president of Evans, took charge of negotiations in behalf of Evans. At the outset of the resumed negotiations the parties agreed, *inter alia*, that the first order of business was to arrive at a consensus, if possible, as to the terms of the basic contract. If agreement could be reached on the basic contract, then the parties agreed to negotiate the terms of a supplemental agreement covering numerous changes which had been made to the original fire bomb specifications.

Throughout the entire negotiations, the contracting officer consistently maintained that, under the applicable regulations governing set-aside procurements, he was not at liberty to consider any unit price for the basic contract in excess of Aircraftsmen's contract price, namely, $76.036 F.O.B. origin. Mr. Strnad vigorously contended, however, that Aircraftsmen's contract price was no longer apogean because of the fact that the Government had now reduced the production rate of 8,000 per month in Aircraftsmen's contract to 3,000 per month for the set-aside procurement. When confronted with Evans' letter of September 1, 1954, quoted in pertinent part above, he argued that in generally accepted business terminology the phrase "terms and conditions" as used in that letter did not include price. In his view, it was contrary to the spirit of the set-aside regulations for the Government to set a lower production rate than that contained in Aircraftsmen's contract without making an upward adjustment in the price so as to compensate Evans for its longer exposure to possible increases in material prices. Nonetheless, he stated that if the condi-

tions imposed by the Government were mandatory and not susceptible to revision, Evans would accept them in the interest of providing work for the persons in its critically distressed labor area. He urged, however, that in all fairness to Evans the Government should either allow an increase in the $76.036 price or consent to the inclusion in the contract of an escalation clause on material prices, particularly aluminum prices. By letter dated November 18, 1954, the contracting officer rejected Strnad's requests in the following language:

> That the maximum unit price for which the basic contract can be awarded cannot exceed $76.036 each; That in accordance with the laws and regulations setting forth procurement for a set-aside quantity, the Contracting Officer is without authority to permit an escalation clause which, when adding the amount of the escalation to the base price, could raise the final price beyond that awarded in the advertised contract.

By an exchange of letters in late November and early December, the parties indicated their agreement on all terms of the basic contract, including a base unit price of $76.036 and a delivery rate of 3,000 bombs per month. Thereupon the contracting officer forwarded to Evans all data relating to subsequent changes in the bomb specifications and asked Evans for an early cost evaluation thereon.

Negotiations ensued with respect to the amount which should be added to the base unit price in order to reflect the increase in costs attributable to the changes made since the award of the Aircraftsmen's contract.[7] Agreement was finally reached on a price increase of $5.844 per bomb. Thus, the total unit price finally agreed upon was $81.88.

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[7] Throughout these subsequent negotiations, Mr. Strnad continued to press, without success, for the inclusion in the contract of an aluminum price escalation clause.

Thereupon, the Legal Division of the Procurement District prepared both the basic contract and Supplemental Agreement No. 1 reflecting the $5.844 increase, and the documents were forwarded to Evans by the contracting officer on January 28, 1955, together with a request for expeditious execution and again denying Evans' continuing request for inclusion of a price escalation clause. Thereafter, some mutually agreeable modifications of no relevance here were made to the documents, and in their final form they were executed, first, by Evans in early February and then by the contracting officer in late February 1955.

Meanwhile, Aircraftsmen was experiencing difficulties in the performance of its non-set-aside portion of the fire bomb procurement. In late January 1955, representatives of Aircraftsmen advised the contracting officer that it had been subjected to aluminum price increases which could have a disastrous effect on Aircraftsmen in its performance of the fire bomb contract, and they requested the addition of an aluminum price escalation clause to the contract. On February 15, the contracting officer professed his uncertainty as to Aircraftsmen's position and inquired whether Aircraftsmen desired its request to be treated as an application for relief "under Section 30, Part IV" of the procurement regulations. By letter dated February 23, 1955, but not received by the contracting officer until March 2, 1955, Aircraftsmen advised that it did desire its request to be treated as an application for relief, and it attached additional documentation in support thereof.

Believing he was without authority to act on Aircraftsmen's request for the aforesaid relief as authorized by Title II of the First War Powers Act,[8] the contracting of-

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[8] Since the early days of World War II, the main defense agencies have been authorized to grant discretionary relief to

(Continued on following page)

ficer forwarded it to MATCOM on March 15, 1955, together with his memorandum-indorsement recommending that the requested relief be denied "at this time" without prejudice to resubmission thereof following completion of the contract. On April 29, 1955, MATCOM denied Aircraftsmen's request because:

> a. Contractor has not established any loss under this contract within the contemplation of APP 30-406.
>
> b. The increases in the cost of aluminum alleged by contractor are such that normally should be taken into consideration by every bidder submitting a bid on a fixed-price contract.

In subsequent conferences with Aircraftsmen's representatives, the contracting officer suggested that Aircraftsmen amend and enlarge its claim for Title II relief so as to encompass possible alternative grounds because, by this time (late June 1955), it seemed to him that even the granting of an aluminum escalation clause would be insufficient to overcome Aircraftsmen's many problems.

On August 12, 1955, Aircraftsmen resubmitted its Title II claim as amended and enlarged. The revised claim took the form of a lengthy letter to which were attached

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contractors suffering losses on account of mistakes. Title II, Section 201, First War Powers Act, 55 Stat. 838 (1941); Executive Order No. 9001, 6 F.R. 6787 (1941); Act of Jan. 12, 1951, 64 Stat. 1257; 50 U.S.C. App. Sec. 611 (1952 ed.); P.L. 85-804, 72 Stat. 972, 50 U.S.C. Secs. 1431-35 (1958). The underpinning for the granting of relief must be a finding that such action would facilitate the national defense or prosecution of the war. See Kramer, *Extraordinary Relief for War Contractors*, 93 U. of Pa. L. Rev. 357, 360 (1945); *Correction of Mistakes in Contracts Under Public Law 85-804*, Government Contracts Monograph No. 1, p. 4 (The Geo. Wash. Univ.) (1961). Title II relief has been referred to variously as "far-reaching," "extraordinary," and "a snare and a delusion." See Fain and Watt, *War Procurement—A New Pattern in Contracts*, 44 Col. L. Rev. 127, 199 (1944) and McClelland, *Title II—One Year Later: A Legislative Midsummer Night's Dream*, 62 Dick. L. Rev. 327 (1958).

many exhibits, schedules, and financial statements. Among other things, the claim contained analyses of mistakes, underestimations and miscalculations on the original bid by Aircraftsmen's prior management, further data and information on increased aluminum costs due to price increases, a statement regarding freight increases, computations showing the actual contract loss and future projected losses, and a lengthy discussion of the experimental nature of the fire bomb resulting in manifold production and testing problems.

On October 3, 1955, the contracting officer recommended favorable action on Aircraftsmen's amended claim, as did also a special board established in MATCOM. After a hearing on October 25, 1955, the Army Contract Adjustment Board issued a decision dated October 28, 1955, containing the following findings:

* * * * *

a. That the completion of the performance of Contract No. DA-30-070-Cml-605 is essential to the national defense.

b. That because of losses sustained in the performance of Contract No. DA-30-070-Cml-605 the applicant will be unable to complete the performance of the contract unless it receives an increase in the contract price.

c. That an increase in the contract price to $87.9391 per unit, F.O.B. origin, for all units delivered and to be delivered, and modification of the contract to provide for delivery of all units F.O.B. origin will enable the applicant to complete the performance of Contract No. DA-30-070-Cml-605.

d. That the amendment authorized herein will facilitate the national defense.

* * * * *

Accordingly, the Chief Chemical Officer was authorized to amend Aircraftsmen's contract so as to increase the unit price retroactively from $76.036 to $87.9391, all deliveries to be F.O.B. origin. The Board took specific note of the fact that the new price of $87.9391 was "much less (over $7) than the estimated reprocurement price."

In February 1956, Aircraftsmen sought further Title II relief and asked the Army Contract Adjustment Board to authorize an increase of the unit price per bomb to $95. The Board held a hearing on March 1, 1956, and issued a decision denying the requested further relief on March 23, 1956. The Board noted that its favorable action of October 28, 1955, was based on advice concerning the need for the fire bomb at that time. However, current advice to the Board indicated that the bomb procurement was no longer essential to the Air Force, and none of the Armed Services considered that either Aircraftsmen or its parent company were essential to them. Accordingly, the Board concluded that it could no longer make the required finding that the granting of relief would facilitate the national defense, and the application for further relief was, therefore, denied. In the same month, an involuntary petition in bankruptcy was filed against Aircraftsmen, and on March 26, 1956, the contracting officer terminated Aircraftsmen's contract for default in meeting the delivery schedule. Aircraftsmen was adjudicated a bankrupt on April 17, 1956.

In October 1956, Evans also applied for Title II relief. After a hearing on June 18, 1957, the Army Contract Adjustment Board denied Evans' application on the ground that the combined resources of both Evans and its parent, Lempco, were such that losses under the fire bomb contract would not substantially impair their productive capacities. On March 25, 1958, the Board denied Evans' request for reconsideration as well as an alternative

ground for relief asserted by Evans on a theory of mutual mistake of fact.

Evans now asks this court to reform its contract. It says that it was misled and defrauded by the contracting officer, or that, at least, its claim for reformation is meritorious because of a mutual mistake of fact.

I cannot agree that, under the circumstances of this case, Evans is entitled to contract reformation. To show his entitlement to such extraordinary relief, a plaintiff must produce evidence "of a very clear and convincing character." *Associated Traders, Inc. v. United States,* 144 Ct. Cl. 744, 750, 169 F. Supp. 502, 506 (1959). And see 3 *Corbin on Contracts,* Sec. 614, particularly the numerous cases cited in footnote 17. The evidence produced by Evans in this case consists essentially of an attack on the contracting officer and is far from "clear and convincing." What is "clear and convincing" on this record, its single most obvious fact, is the contracting officer's inflexible insistence during all negotiations that the unit price in the basic set-aside contract could in no event exceed the award price (as added to by the General Accounting Office) for the non-set-aside contract, namely, $76.036.[9] Short of deliberate myopia, Evans' representatives simply could not have misunderstood his position in this regard. He reiterated it almost *ad nauseam.*

Whether the contracting officer was right or wrong in this interpretation of the set-aside regulations seems beside

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[9] He took the same position with respect to the inclusion in the contract of an aluminum price escalation clause on the ground that such a clause could cause an increase in the basic price of $76.036 and hence, in his view, would be illegal. In this connection it is interesting to note his testimony that, assuming he had authority to agree to including such an escalation clause, he felt that because of his negotiating position, he would have refused to do so.

the point.[10] Typically, the remedy of reformation is intended to give relief from a contract which does not conform to antecedent expressions on which the parties have agreed. It is not a proper remedy for the enforcement of terms to which the defendant never assented. 3 *Corbin on Contracts,* Sec. 614, *supra.*

Here there can be no doubt that the written contract precisely expressed the terms and conditions upon which both parties had agreed (Evans reluctantly) in their antecedent negotiations. Evans contends, however, that there was a mutual mistake of fact. It says that such mutual mistake is to be found in the assumption by both Evans and the contracting officer that Aircraftsmen's price per bomb was definitely and finally fixed for the non-set-aside procurement at $76.036 whereas, in fact, it developed that, by reason of the Title II relief later afforded to Aircraftsmen, that company actually received $87.9391 per bomb. Evans points to this court's decisions in *Poirier & McLane v. United States,* 128 Ct. Cl. 117, 120 F.Supp. 209 (1954), *Panama Power & Light Co. v. United States,* 150 Ct. Cl. 290, 278 F.2d 939 (1960) and *National Presto Industries, Inc. v. United States,* 167 Ct. Cl. 749, 338 F.2d 99 (1964) *cert. den.,* 380 U. S. 962 (1965), as justifying reformation

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[10] In its brief, the Government argues persuasively that the contracting officer's interpretation of the applicable regulations was correct and that he had no alternative other than to insist on the non-set-aside *award* price as the absolute ceiling for the set-aside contract. It is also arguable, however, that the clear prohibition in the statute and regulations against a price differential was intended to apply only where all material provisions in the two contracts were the same, and here there was a substantial difference in the production rate specified in the contracts. This difference may well have neutralized the price differential prohibition and justified the contracting officer in negotiating a higher price for the set-aside procurement. However, as Evans well knew, he rejected any such liberal interpretation of the regulations. Indeed, by its letter of September 1, 1954, *supra,* Evans seems to have accepted his position.

because of such mutual and, as it developed, mistaken assumption.

Those cases, however, are inapposite. In *Poirier & McLane,* both the Government and the contractor believed that the "prevailing wage rate" which the contractor was required by the contract to pay its labor had been set at 85¢ per hour. As a matter of fact, however, the actual prevailing rate was $1.00 per hour, and since the court found that both parties intended that the contract should contain the actual rate whatever the figure, it reformed the contract to reflect such intent. By contrast, here there can be no doubt of the contracting officer's intent to negotiate a price not in excess of Aircraftsmen's *award price* and that exact amount was accurately known to both parties.

Likewise, in *Panama Power & Light Company,* the testimony for both parties clearly showed that an ambiguous contract clause did not read as the negotiators had intended it should. The court reformed the clause to reflect the mutual intention. Here, there is no such ambiguity.

In *National Presto Industries,* the court emphasized that:

> * * * To do justice here we need go no further than formulate and apply a rule for cases of mutual mistake in which the contract, properly construed, allocates the specific risk to neither party—and the side from whom relief is sought received a benefit from the extra work of the type it contemplated obtaining from the contract, and would have been willing, if it had known the true facts from the beginning, to bear a substantial part of the additional expenses. At p. 769.

There is nothing in the present record, however, which indicates that had he been able to forecast Aircrafts-

men's Title II relief, the contracting officer would have negotiated with Evans at a higher figure. Since, in his view, Title II relief was entirely noncontractual in nature, and since further, in his view, the *award price* to Aircraftsmen fixed the maximum figure for the set-aside procurement, it is probable that even had he "known the true facts from the beginning" he would have continued to insist that the negotiated price could not exceed $76.036. The court, however, was impelled to an opposite conclusion in *National Presto Industries,* a conclusion which was a major factor in its decision to reform that contract. Evans' reliance on that case is, therefore, misplaced. See *Flippen Materials Co. v. United States,* 160 Ct. Cl. 357, 368, 312 F.2d 408, 415 (1963).

Apparently recognizing that its claim of mutual mistake of fact is weakly grounded, Evans argues most vigorously that it was misled and defrauded by the contracting officer. It says that he deliberately concealed certain information which was known only to the Government and which was vital to Evans in arriving at its decision to enter into the set-aside contract. The vital information alleged to have been withheld from Evans during the negotiations was that the fire bomb was experimental and that in manufacturing it Aircraftsmen was encountering severe production difficulties, that substantial changes in the specifications and manufacturing methods had to be made in order to produce a satisfactory bomb which, in turn, would necessitate a price revision, that Aircraftsmen's bid had been predicated upon a substantial underestimation of its production costs, that it had become financially impossible for Aircraftsmen to perform the non-set-aside contract at the unit price of $76.036, and that finally Aircraftsmen had filed an application for financial relief which was being processed by the Procurement District. The inevitable result of this alleged con-

cealment, says Evans, was to lead it to believe that Aircraftsmen had experienced no difficulties in performing at the price of $76.036 and that, therefore, Evans could prudently enter into the set-aside contract at the same unit price. To Evans, this was chicanery which, in Macbeth's words, could only "commend the . . . poisoned chalice to the lips."

The difficulty with Evans' position is essentially one of timing. The most this record can be said to support is that during the first two weeks of February 1955, the contracting officer had become aware in a general way that Aircraftsmen was experiencing both production and financial difficulties in its performance of the contract and that it had requested an aluminum price escalation clause. However, the next step which Evans would have the court take is much too long. It says that the contracting officer's failure immediately to communicate this unverified information to Evans' negotiators constituted fraud.

But whatever forebodings he might have had, the contracting officer at this point in time did not know either the specific nature of Aircraftsmen's problems or whether there was any merit to its complaints. His knowledge as to these matters developed gradually over a period of several months following the execution of the Evans' contract. As a result of conferences with Aircraftsmen's representatives and an investigation of its detailed application for Title II relief filed August 12, 1955,[11] the contracting officer had

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[11] Aircraftsmen had filed an earlier Title II application under date of February 23, 1955. This document was not received by the contracting officer until after the execution of Evans' contract. But even if it had been received prior thereto, it contained almost no information which would have acquainted the contracting officer with the true nature of Aircraftsmen's problems other than those associated with the continuing increases in aluminum prices. The record is clear that Evans' representatives

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obtained sufficient verification of Aircraftsmen's allegations so that by October 3, 1955, he felt warranted in recommending favorable action on the Title II application and in certifying that Aircraftsmen's "financial distress was caused by a number of factors, namely: (a) an original underestimation of costs; (b) lack of extensive working capital to carry the contract of this magnitude during shutdown periods necessitated by change orders; and (c) failure to anticipate a rising market in a basic commodity."

From the foregoing it is clear that as of the end of February 1955, when Evans' contract was fully executed, the contracting officer had only surmises, not verified facts, as to the nature of Aircraftsmen's problems. Obviously, he cannot be charged with fraud, either actual or constructive, in failing to disclose "facts" which he did not actually know to be facts. *Cf. Helene Curtis Industries, Inc. v. United States,* 160 Ct. Cl. 437, 312 F.2d 774 (1963); *Potashnick v. United States,* 123 Ct. Cl. 197, 105 F. Supp. 837 (1952); and *Ragonese v. United States,* 128 Ct. Cl. 156, 120 F. Supp. 768 (1954), in all of which the Government had actual knowledge as to the nature of the work to be done but did not disclose it to the contractors leaving them to "flounder on their own." *Helene Curtis Industries, Inc., supra,* at p. 444 of 160 Ct. Cl. and at p. 778 of 312 F.2d. Evans' claim of fraud fails, therefore, for lack of substantiation in the record.[12]

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already knew as much, or more than, the contracting officer about those price increases.

[12] There may be merit in the Government's alternative contention that, even assuming the contracting officer was possessed of relevant facts regarding Aircraftsmen's troubles, he was not at liberty legally to disclose those facts to a competitor such as Evans. See 18 U.S.C. Sec. 1905 and ASPR 3-219.4(c), *infra.* However, due to the failure of proof discussed above, the point need not be reached here.

In the final analysis, it is difficult to escape the conclusion that what Evans is really complaining about is the failure of the Army Contract Adjustment Board to give it the same or similar relief from an improvident contract as that afforded to Aircraftsmen.[13] The disparity in the Board's actions does leave one with a sense of unfairness and discrimination. But the courts are powerless to compel the granting of Title II relief which depends entirely upon an administrative determination that such relief would facilitate the national defense. See footnote 8, *supra*. That determination is committed by the First War Powers Act to the sole discretion of the President or his delegates. See *Bolinders Company, Inc. v. United States*, 139 Ct. Cl. 677, 153 F. Supp. 381 (1957), *cert. den.* 355 U. S. 953 (1958) where the court said at 139 Ct. Cl. 681, 153 F. Supp. 383-4:

> Except for the First War Powers Act, *supra*, plaintiff would of course have no basis whatever for asking an increase in the contract price, and the First War Powers Act was not passed for the benefit of contractors or for their relief from an unprofitable contract, but solely for the benefit of the nation as a whole, in order to facilitate the prosecution of the war. *Atlantic Corporation v. United States*, 125 C. Cls. 464, 480.
>
> The Act committed to the sole discretion of the President the determination of whether or not an increase in the contract price would facilitate the prosecution of the war. His action, or the action of the agencies to whom he had delegated the power granted, was not subject to review by the courts. *Indeed, the Act conferred no rights on the contractor.* (Emphasis supplied.)

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[13] Counsel for Evans firmly deny that this observation reflects the theory of their case.

To the same effect are *Commonwealth Engineering Co. v. United States,* 148 Ct. Cl. 330, 180 F. Supp. 396 (1960), *cert. den.* 364 U. S. 820 (1960); and *Theobald Industries, Inc. v. United States,* 126 Ct. Cl. 517, 115 F. Supp. 699 (1953), *cert. denied* 347 U. S. 951 (1954).

In considering Evans' application for Title II relief, the Board was unable to find, as it had in Aircraftsmen's case, that the granting of relief would facilitate the national defense. This seems to have been due to the Board's conclusion on the record before it that, considering the combined resources of Evans and its parent, the losses suffered in Evans' performance of the contract would not substantially impair its productive capacity.[14] Therefore, the Board denied the application, and so far as this court is concerned, that discretionary action put an end to the matter.

For all of the foregoing reasons, plaintiff's petition must be dismissed.

NICHOLS, *Judge,* dissenting:

There is one reason which leads me to disagree with the trial commissioner's otherwise convincing opinion.

The findings show that in the protracted negotiations leading to execution of the Evans Reamer contract, a ground rule had become established that the Government would not pay more than the Aircraftsmen price and Evans Reamer would not take less. In effect the price had become non-negotiable and was to be determined by an exterior circumstance. But the contracting officer clearly indicated that he looked askance on direct contact between Evans Reamer and Aircraftsmen, which he called, for somewhat obscure reasons, "collusion." Evans Reamer

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[14] The contrary was found to be true in the case of Aircraftsmen.

was to look to him for whatever it was to know about the Aircraftsmen contract. In these unique and peculiar circumstances—and, of course, I address my remarks to no others—I believe the contracting officer was under a duty to warn the plaintiff, before its contract was executed by both parties, if he entertained any expectation that the Aircraftsmen price might not hold firm. Breach of this duty should give reason for this court's making available, as circumstances might dictate, the equitable remedies of rescission or reformation. It would not be necessary to level against the officer the harsh accusation of fraud, or at most only of the "constructive" variety. The case would resemble, among decided cases, perhaps most closely that of the contracting officer who knows or should know a bidder has made a mistake in his bid, but awards him the contract without giving any warning. *Chernick v. United States,* 178 Ct. Cl. 498, 372 F.2d 492 (1967). In that case we passed not one stricture on the contracting officer's good faith, nor did we need to in adjudicating the claim.

If the formal documented application of Aircraftsmen for Title II relief had come in to the contracting officer before the final award to Evans Reamer, and he had not warned the plaintiff, I believe the outcome of the case would have been entirely different. Just a few days make all the difference. The commissioner says (in the opinion, not the findings) that before the award to plaintiff the contracting officer had "only surmises, not verified facts, as to the nature of Aircraftsmen's problems * * *." To sustain the result reached, it is vital that this characterization be correct. The commissioner had the officer before him as a witness, and no doubt was as well situated to look into the man's mind as triers of fact ever are. But I question whether any well advised contracting officer would throw out such a broad hint to a contractor to apply for

the extraordinary relief, available only to contractors in grave enough difficulty, under Title II, as this one did on February 15, (Finding 30), because of troubles he merely surmised. Their letter to him of February 11, (Finding 29), I would hold of itself afforded more than surmise, disclosing as it did that they had been unable to pay approximately two-thirds of their expenses. I do not think "surmise" is the *mot juste*, and if the commissioner had selected one more in accord with his detail findings, the result might well have been different. I miss here the equitable approach of *National Presto Industries, Inc. v. United States*, 167 Ct. Cl. 749, 338 F. 2d 99 (1964). If this case is not to go down in history as an instance of atavism in the evolution of law, it must be explained in the peculiar, and to me inexplicable, view the court and the commissioner take as to the ultimate facts.

In *Maxwell Dynamometer Company v. United States*, No. 120-62, ___ Ct. Cl. ___ (decided today), the Government representatives watched plaintiff struggle in vain to satisfy specifications, which as construed by him, virtually could not be satisfied. In the litigation, the Government contended that the correct construction was much less onerous, and if plaintiff insisted on attempting more, the loss was his. We are holding that the Government is bound by plaintiff's interpretation of the specifications in view of its failure to warn him that he was attempting more than was required. Either it practically construed the specifications as plaintiff did, or if it did not, its failure to warn was "unconscionable" action. As the specifications so construed were defective as impossible to perform, plaintiff we hold is entitled to recover the costs incurred in his vain attempts. While the circumstances are different, the case I believe again, as in *Chernick, supra*, reflects the equitable obligation of a Government contracting

officer not to stand by and watch a contractor plunge into an abyss, which he could prevent by divulging information in his possession and relevant to the contract, but hidden from the contractor. The possibly penetrable character of the ceiling on Aircraftsmen's price was just such a circumstance, and the court which is deciding *Maxwell Dynamometer*, in my opinion, ought to be able to see more merit in the instant claim than it has been able to do.

I do not conclude that plaintiff's price ought to be reformed to the same as *Aircraftsmen's*. Equitable reformation might be satisfied with some lesser figure. We are not to give plaintiff Title II relief; we are to give plaintiff the least price it might have negotiated had it known Aircraftsmen was to get Title II relief.

The outcome leaves me, as it does the commissioner, "with a sense of unfairness and discrimination," only I think we could and should do something about it.

Findings of Fact

Dramatis Personae

1. (a) The plaintiff, Evans Reamer & Machine Company ("Evans"), is an Ohio corporation engaged in fabricating and machining metal goods. It seeks reformation of a contract (No. DA-30-070-CML-650) between it and the United States providing for the manufacture and delivery F.O.B. origin of a negotiated set-aside portion of a fire bomb procurement. Evans is a manufacturing facility only, and its plant is located in New Lexington, Perry County, Ohio, approximately 165 miles south of Cleveland. Evans is a wholly owned subsidiary of another Ohio corporation, Lempco Products, Inc. ("Lempco") whose manufacturing facilities and offices are located in Bedford, Ohio.

(b) During the period of time the contract negotiations (described below) were in progress, the chairman of the board of directors of both Lempco and Evans was Mr. James F. Strnad. His son, Mr. James J. Strnad, was the president of Lempco and vice-president of Evans. Mr. W. J. Blazek, who was concerned principally with the performance of the contract in question, rather than in its negotiation, was president of Evans. Mr. J. F. Fahey was treasurer and assistant secretary of both Evans and Lempco, and Mr. P. A. Varley was assistant to the presidents of both Lempco and Evans.

(c) During this same period of time, the Government contracting officer was Mr. Jesse Gershberg. Mr. Benjamin Halperin was an attorney-adviser for the Government and Mr. Herbert S. Heffler was a contract price analyst. All were employed by the New York Chemical Procurement District (hereinafter called the "Procurement District") of the Department of the Army.

(d) The Aircraftsmen Company ("Aircraftsmen") was a California corporation engaged in the manufacture of aircraft parts and other metal products. As will appear below, Aircraftsmen was the successful bidder on the non-set-aside portion of the fire bomb procurement involved.

The Invitation for Bids and Responses Thereto

2. Late in 1953, the Procurement District was assigned responsibility for procuring and delivering a substantial quantity of fire bombs to the Air Force. At this particular time, invitations for bids were normally issued by the Procurement District within 30 days after receipt of notice of its procurement assignments. The preparation and issuance of the invitations for bids under the fire bomb procurement assignment, however, took six times longer

than the normal period. This longer lead time appears to have been occasioned by some novel aspects of the fire bomb which had recently been designed and developed by the Army Chemical Corps.

3. Under date of May 14, 1954, the Procurement District issued its Invitation for Bids, No. CML-30-070-54-188, for the manufacture and supply of 73,944 "Bomb(s), Fire, External, 750 lb. E74R3" (fire bombs) in accordance with referenced specifications and drawings on the basis of both F.O.B. origin and F.O.B. destination. The IFB stated that bids would be publicly opened on June 15, 1954.

The fire bomb was to be aluminum in fabrication, weighing 750 pounds, and was to be approximately 11 feet long with a diameter of 18 inches. Its shape resembled that of a cigar and it contained approximately 650 pounds of napalm, a jelled gasoline, which will burn at high temperatures when ignited and is very difficult to extinguish.

In addition the invitation for bids contained a note entitled "Set-Asides For Firms in Labor Surplus Areas in Accordance with The Armed Services Procurement Regulations 1-302.4." The criteria for participating in set-asides was partially explained therein, and all bidders desiring to participate in negotiations for the set-aside quantities of the procurement were invited to attach a letter to their bids showing their qualifications and eligibility.

4. More than 50 bids, including those of Evans and Lempco, were received by the Procurement District in response to the invitation, and the bids were opened on June 15, 1954. Evans also included a letter with its bid stating that it was eligible and desirous of participating in the negotiations for any set-aside quantities. After the low bidder was permitted to withdraw because of gross errors in its bid, the order of the lowest bids was as follows:

Name of Bidder	*Per Bomb F.O.B. Origin*
Aircraftsmen	$73.98
Lempco	87.40
Evans	87.65

The Government's prior estimate as to the cost of producing these fire bombs was $125 per bomb.

5. Due partially to the long procurement lead time involved in the formulation of the IFB, and in order to make as early an award as possible, defendant's contracting officer immediately dispatched two pre-award survey teams to visit the two lowest bidders. One team went to Aircraftsmen and the other went to Lempco for the purpose of ascertaining their respective capabilities and capacities for manufacture of the fire bombs. Favorable survey reports were furnished by both teams.

However, during the Aircraftsmen's survey, it was discovered that due to a mistake, Aircraftsmen's bid was $2.056 per bomb lower than it should have been. Nonetheless, Aircraftsmen's officials notified the contracting officer that, in spite of the mistake in bid, they desired an award of the contract at the bid price of $73.98 per bomb. It was agreed, however, that the mistake in bid would be submitted to the General Accounting Office requesting its approval for an increase in price per bomb of $2.056. Meanwhile, Mr. Varley on behalf of plaintiff had informed the contracting officer, Mr. Gershberg, prior to award, that a Dun and Bradstreet report showed a recent $150,000 small business loan to Aircraftsmen, and consequently, in his opinion, that company was not financially capable of performing the contract. Standing alone, this bare information did not disturb Mr. Gershberg. However, because of the disparity between Aircraftsmen's bid and the Government's estimate of cost to produce the fire bomb, Gersh-

berg felt some personal concern over Aircraftsmen's ability to successfully perform the contract at the bid price.

6. Contract No. DA 30-070-CML-605 dated June 28, 1954, was awarded to Aircraftsmen. The contract, which represented the advertised, or non-set-aside, portion of the procurement, called for the manufacture and delivery of 73,944 fire bombs at prices of $73.98 per bomb for 33,493 bombs, F.O.B. origin, and $77.78 per bomb for 40,451 bombs, F.O.B. destination. After the first two months of production, the delivery schedule for the remainder of the production period was at the rate of 8,000 bombs per month. It was understood and agreed that a price increase of $2.056 per bomb would be granted in the event GAO ruled favorably on Aircraftsmen's pending mistake-in-bid claim. On October 18, 1954, GAO approved the claim, and thereupon the contract prices were increased by $2.056 per bomb.

The Negotiations For the Set-Aside Portion of the Fire Bomb Procurement

7. The Invitation for Bids authorized and permitted the Procurement District to set aside part of the Government's requirements for the fire bomb procurement for negotiation with suppliers who were located in a Group IV Area of Labor Surplus and who had submitted "a bid upon items not set aside" at a unit price "within 120% of the highest award made" on the competitive bidding. As stated above, Evans' plant is located in New Lexington, Perry County, Ohio, a coal mining, brick and tile manufacturing community. Since its predominant industry is coal mining, it has had a chronic unemployment situation for many years. At the time of the bid opening described above, the area had not been formally classified by the Department of Labor as a Group IV Area of Labor Surplus

(hereinafter called "Group IV Area"). Evans petitioned the Department of Labor for such classification on June 8, 1954. During the period involved, in order to qualify as a Group IV Area, it was necessary to have 6 percent or more of the eligible labor force unemployed. Over 14 percent of the eligible labor force was unemployed in the area where Evans' manufacturing facilities were situated. Consequently, when the invitation for bids issued with a note providing that a portion of the procurement might be set aside for negotiations with firms in Group IV Areas, Evans advised the Procurement District that the area where its plant was located was then in the process of being classified as a Group IV Area.

8. On June 24, 1954, the Department of Labor formally classified Perry County as a Group IV Area. Shortly thereafter, the contracting officer learned of the official classification and, after checking the records, he determined that Evans was the only bidder eligible to negotiate for the "set-aside" procurement. Under date of July 1, 1954, he wrote Evans advising of his receipt of information as to the designation of Perry County as a Group IV Area and making arrangements for a survey team to visit Evans' plant for the purpose of ascertaining Evans' capability to perform fire bomb production in a labor surplus area.

9. On July 12, 1954, the survey team visited Evans' plant, and its report was favorable as to Evans' financial and technical capacity to perform a contract, subject to its obtaining a guarantee of financial support from *Lempco*.[1] On July 20, 1954, the contracting officer sent a letter to Evans, reading in pertinent part:

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[1] Such guarantee of financial support by Lempco was later obtained by Evans.

In accordance with Note 4 of the referenced bid and the procedures and regulations cited by Armed Services Procurement Regulation 1-302.4, your company is being tendered an opportunity to quote for an additional quantity of bombs. During recent conversation in this office with yourself and Mr. Varley, it was indicated that the Armed Services Procurement Regulations were available to you. If not, same may be procured from the Government Printing Office in Washington, D. C.

The bomb is to be manufactured in accordance with all of the terms and conditions cited in the referenced bid as amended by Amendments 1 and 2 thereof, with the exceptions noted below:

A quantity of 71,661 bombs will be contracted for with monthly deliveries beginning in April 1955.

* * * * *

A review of the financial condition of your company indicates the availability of sufficient capital from the parent organization. Prior to the award of contract, proper binding legal agreements will be required between the parties.

* * * * *

In accordance with the Regulations, the award made under Bid CML-30-070-54-188 was $73.98 each, F.O.B. Origin. Inasmuch as the delivery point is unknown at this date, the additional quantity is being purchased at the F.O.B. Origin price only.

* * * * *

10. By letter dated July 23, 1954, the chairman of Evans' board, James F. Strnad, advised the contracting officer that because the basic costs for manufacturing the bomb "under the most favorable conditions" would exceed the proposed set-aside price of $73.98, Evans was not willing to take on the set-aside of 71,661 bombs "at the $73.98 price, F.O.B. origin." The letter went on to state that the current trend of increasing prices for materials and labor

due to a lumber strike and rising aluminum prices made the venture too risky and dangerous at that price. The letter concluded:

> For these reasons we regret that we cannot take advantage of the "Set-Aside." It is unfortunate, indeed, because of the unemployment situation in our county running between 20% to 25%, but to take on this job, we would be running the risk of hurting our corporation to the extent that could be ruinous to us, which in the end might mean a still further loss of employment to our already distressed area.
>
> We understand from you in our conversations with us that our refusal of the "Set-Aside" would mean that this "Set-Aside" quantity will be negotiated with possibly the lowest five, ten or fifteen companies that originally bid on this job, or that it may be put out on "open bid" again, with the lowest responsible manufacturer being awarded this contract.
>
> We want to take this opportunity to inform you that we are very much interested in negotiations with you for this "Set-Aside" quantity, or if this will be impossible, that we are very much interested in bidding again. Therefore, we sincerely request that we be notified and given the opportunity on either one of the methods that will be pursued.

By the time this letter was written, Evans' representatives had become aware of Aircraftsmen's mistake-in-bid claim, and they knew that such claim had been submitted to GAO for a ruling as to whether the Aircraftsmen's contract price should be increased to reflect the mistake. Meanwhile, upon receipt of Evans' letter of July 23, the contracting officer had promptly conferred with the commanding officer of the Procurement District regarding further action on the procurement assignment. At that conference the commanding officer decided that the contracting officer should contact Evans' representa-

tives and ascertain whether they would be interested in negotiating for the set-aside portion of the procurement at a maximum price of $76.036 per bomb which maximum reflected Aircraftsmen's contract price plus the amount attributable to its bid mistake.

11. After the interoffice conference was concluded, on July 27, 1954, the contracting officer telephoned Evans. Later in the day he had a group telephone conversation with Mr. Strnad and his assistant, Mr. Varley. The contracting officer inquired whether Evans would be interested in further negotiations if the maximum price were set at $76.036 instead of $73.98, and explained that the increase was attributable to the Aircraftsmen mistake-in-bid claim of $2.056 which might be allowed by the GAO. The contracting officer further stated that if Evans were not interested in further negotiations, he was planning to prepare and issue another invitation for bids on the fire bombs in which event Evans would be "on the list" to bid again. During this telephone conversation, Mr. Strnad answered the contracting officer's question in the negative, stating that Evans would not be interested in negotiations even if the maximum price were $76.036 instead of $73.98. Thereupon, following the telephone conversation, the contracting officer wrote Evans stating:

> In confirmation of our conversation of this date and with reference to your letter of July 23rd, 1954, it is understood that your company is also not in a position to meet a price of $76.036 F.O.B. Origin.
>
> * * * * *

At the same time the contracting officer reported Evans' rejection to his superior and, believing negotiations to have come to an end, he commenced action leading to the issuance of another invitation for bids on the remaining quantity of fire bombs.

12. Between July 27 and July 29, Mr. Strnad apparently changed his mind and decided that Evans should negotiate for the set-aside portion at a maximum price of $76.036. On July 29, he and Mr. Varley telephoned the contracting officer to tell him that they had reconsidered the matter and desired to negotiate. However, the contracting officer advised them that, in view of their earlier rejection, he had considered negotiations closed and had started the machinery in motion for another bid invitation. Mr. Strnad took the position that the contracting officer had misunderstood the prior telephone conversation.[2] The record is entirely clear, however, that the contracting officer had not in fact misunderstood Mr. Strnad's definite rejection of the $76.036 price. Mr. Varley testified that he and Mr. Strnad spent the next five or six weeks endeavoring to convince the contracting officer that their rejection of further negotiations had been "premature and ill-advised" and that Evans was "ready to negotiate the contract * * * at the $76.036 price." After the original rejection they had given the matter more thorough consideration and had speculated on the possibility that there might be some factors other than Aircraftsmen's bid mistake which could result in further price increases.[3]

13. On July 30, 1954, Evans sent a telegram to the contracting officer stating that it was interested "in negoti-

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[2] It is not clear what Mr. Strnad meant by this statement. If he meant to imply that he had not rejected an opportunity to negotiate at a maximum price of $76.036, then his assistant, Mr. Varley, who participated in the prior conversation, also misunderstood him. In his testimony at the trial, Mr. Varley was quite clear in his recollection that, in the July 27 conversation with the contracting officer, Mr. Strnad had stated that Evans "would not be interested in negotiating further at that price."

[3] They had learned, for example, that the specifications on the packing box for the bomb were to be changed and speculated that other changes might also be made.

ating acceptance of the set-aside quantity at any price allowed Aircraftsmen in excess of the above ($73.98) price for the same or substantially similar material as offered" in Evans' original proposal. This telegram was followed up by a letter to the contracting officer dated July 31, 1954, in which Evans amplified its desire to resume negotiations and concluded:

> * * * we are willing to meet the successful bidder's price, and request that we be given the privilege of delivering at that given price the same material that they will deliver. If there be a material change or a specification change of any kind, then we too should be given the privilege of adjusting our prices upward or downward as the case may be.
>
> We sincerely trust you will give us the opportunity to meet with you to negotiate on the same price and material basis as the successful bidder.

On the same day Evans sent the Procurement District a telegraphic protest stating its objection to any action on the part of the contracting officer with respect to the set-aside procurement other than by way of "direct contract negotiations" with Evans.

14. Mr. Strnad followed up the telegraphic protest by a personal conference with the Commanding General of the Army Chemical Corps, Materiel Command (MATCOM), Baltimore, Maryland, which was the next higher authority over the Procurement District. This visit resulted in an order from MATCOM directing the contracting officer to forward the file on Evans for appellate review by MATCOM. The contracting officer complied with MATCOM's order and also submitted his recommendation that, in view of Evans' earlier rejection of negotiations at a maximum price of $76.036, the protest should be denied and the Procurement District should be permitted to proceed with a new invita-

tion for bids. During the period of time that the matter was on appeal to MATCOM, i.e., from July 31 to mid-October, the contracting officer, of course, refused to resume negotiations with Evans despite numerous requests by Evans to do so. By letter dated August 6, 1954, Evans advised the contracting officer of its willingness to accept a contract for the set-aside quantity of fire bombs at a price of $76.036 F.O.B. origin. A delivery schedule was proposed and a cost breakdown was submitted, along with assurances that more than 60 percent of the contract would be performed in a Group IV area and that full financial support would be furnished Evans by Lempco. On August 23, 1954, Evans wrote virtually the same proposal to the contracting officer except that the price was proposed on the basis of $73.98 for each bomb, subject to an increase of $2.056 per bomb if Aircraftsmen's claim to GAO were successful. The contracting officer simply forwarded both proposal letters to MATCOM.

15. Pursuant to MATCOM's direction, the contracting officer under date of August 26, 1954, made the following inquiry of Evans:

> We are in receipt of your letter of August 23rd, 1954, pertaining to the above Invitation for Bid.
>
> We have been advised to request your position as to whether the terms and conditions contained in said letter are applicable to a production rate of 3000 bombs per month, with deliveries to begin in April or May 1955.[4]

Evans' response on September 1, 1954, read in pertinent part:

> This will acknowledge receipt of your letter dated 26 August, 1954, regarding subject bid invitation.

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[4] The original invitation for bids on the non-set-aside portion of the procurement had specified a delivery rate of 8,000 bombs per month.

> We are pleased to advise you that the terms and conditions contained in our letter of August 23, 1954, are applicable to a production rate of three thousand (3,000) bombs per month with deliveries to begin in April or May, 1955, as well as to the production rate originally specified.
>
> * * * * *

The contracting officer forwarded that response to MATCOM.

16. In a letter dated October 1, 1954, MATCOM requested the Chief Chemical Officer to advise whether the Procurement District had legal authority to enter into a contract with Evans for the set-aside fire bombs at $73.98 each, subject to an increase of $2.056 per bomb in the event GAO acted favorably on Aircraftsmen's mistake-in-bid claim for such increase in its non-set-aside contract.[5] Before final action was taken on MATCOM's request, however, the Comptroller General on October 18, 1954, ruled favorably on Aircraftsmen's claim and authorized an amendment to its contract increasing the price $2.056 per bomb for a total of $76.036 F.O.B. origin per bomb. At that time MATCOM's request of October 1 was before the Deputy Chief of Staff for Logistics who treated the matter as moot "in view of the decision of the Comptroller General, B-121255" and returned the request "without action." Accordingly, MATCOM treated the Comptroller General's decision as having established the price on the non-set-aside portion of the procurement and decided that action should be taken by the Procurement District "to complete the award of the set-aside quantity at the earliest possible moment."

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[5] In the opinion of both MATCOM and the Procurement District, the applicable regulations did not permit this type of contract as proposed by Evans. However, since the proposal was a novel one to MATCOM, it decided to seek the advice of higher authority.

Meanwhile on October 12, 1954, MATCOM had advised the Procurement District as follows:

* * * * *

> It is the intention of this Headquarters to continue negotiations for the set-aside quantity under the fire bomb program with the Evans Reamer and Machine Company and request that action be taken to expedite these negotiations up to the point of signing a formal contract. It is expected that a decision regarding the mistake in bid by the Aircraftsmen Company in the amount of $2.05 will be forwarded to this Headquarters on 13 October 1954 and immediately upon receipt of same will be forwarded to your office.

* * * * *

17. Although he was in disagreement with, and was not happy about, MATCOM's reversal of his recommendation, the contracting officer proceeded at once to resume negotiations with Evans. On October 15, 1954, he addressed a letter to Evans stating that he had been "authorized to re-enter into negotiations * * * under the terms of the labor surplus provisions of this bid, at an optimum production rate of 3000 bombs per month, the deliveries commencing May 1955." He requested Evans to submit cost breakdowns, location of any proposed subcontractors, and a labor process operation list, upon receipt of which he stated arrangements would be made for a negotiation conference.

18. On October 26, 1954, the parties resumed negotiations at an initial conference held in the offices of the Procurement District on that date. By this time, Mr. James J. Strnad, vice president of Evans, had supplanted his father as Evans' principal representative. Mr. Gershberg, as contracting officer, continued to act as the Government's principal representative. Both men were assisted by several supporting personnel.

During the October 26 and subsequent conferences, the parties agreed that efforts would be made to conclude negotiations in all respects by December 15, 1954, and to this end, the following ground rules covering the order of procedure were established:

1. Evans would suggest a delivery schedule for mutual agreement.

2. Evans would submit a revised performance guarantee on the part of Lempco.

3. Defendant would then send Evans a basic contract, complete in all respects, but not signed.

4. Evans would state its agreement or disagreement as to the terms of such basic contract.

5. Defendant would then furnish Evans all data relative to the numerous changes which had been made to the original specifications since the award to Aircraftsmen of the non-set-aside portion.

6. Evans would thereupon submit its proposed cost data on all such changes.

7. These additional costs would be the subject of negotiation by correspondence and personal meetings.

8. On reaching agreement upon all prior phases the parties would simultaneously execute both the basic contract and the supplemental agreement covering the changes.

In addition, the contracting officer asked Evans' representatives to submit additional cost data and Mr. Strnad requested the contracting officer to furnish Evans an interpretation of the term "optimum quantity" contained in the regulations dealing with set-aside procurements. Under date of November 3, 1954, Evans furnished the requested additional data, whereupon the Procurement Dis-

trict sent its price analyst, Mr. Heffler, to Lempco's offices for the purpose of reviewing the submitted cost data. In the course of his review, Heffler found that Evans' cost presentations were based upon a production rate of 8,000 bombs per month. Since his understanding was that negotiations were to be limited to a production rate of 3,000 bombs per month, he discontinued his review and returned to New York.

19. By letter dated November 9, 1954, the contracting officer referred Evans to a recent telephone conversation between the parties and took issue with Evans' claim that Government personnel had not clearly defined the conditions for further negotiation of the set-aside contract. The contracting officer then proceeded "to reiterate our position" that the conditions were (1) to negotiate on the basis of the set-aside provisions contained in the original IFB, (2) that the optimum quantity, as interpreted by the Government, was a quantity "in excess of 50,000 bombs, at a production rate of 3,000 per month, on a one shift basis," (3) that Evans must submit detailed cost breakdowns for the Government's examination, and (4) that negotiations would be "based upon a price not in excess of $76.036 per unit, F.O.B. Origin." The letter concluded by setting a deadline of November 17, 1954, within which Evans must notify the contracting officer of its willingness to negotiate "in good faith upon the above conditions." Absent such notification, the contracting officer would assume that Evans could not meet the conditions, would consider the preliminary negotiations abandoned, and would "proceed with our normal procurement processes for this item." Evans received this letter on November 11, 1954.

20. Meanwhile, on the same day that the contracting officer wrote the above letter, Mr. Strnad made a long distance telephone call to the Chief of the Industrial Divi-

sion of MATCOM in Baltimore and complained that the Procurement District representatives had taken the position that the $76.036 price applied to a production rate of 3,000 bombs per month whereas Evans had understood that such price applied only to a rate of 8,000 bombs per month as specified in the IFB. MATCOM's representative called his attention to Evans' letter of September 1, 1954, which had stated that the terms and conditions contained in Evans' proposal of August 23, 1954, applied equally to production rates of 3,000 and 8,000 per month. See finding 15, *supra*. Mr. Strnad responded that by using the phrase, "terms and conditions," Evans had not intended to include price. He was fearful that changes in labor and material costs over the longer period involved in a production rate of 3,000 per month might reduce Evans' profit to a negligible point. He was willing to risk the effect of such expected changes except in the case of aluminum, and with respect to that material, he urged the inclusion of an escalation clause in the contract to provide for adjustments based on the price of aluminum. However, he added that if his insistence upon such an escalation clause would result in the Government canceling negotiations and proceeding to formal advertising, then he would be willing to take the contract without an escalation clause. MATCOM's representative refused to express an opinion on the matter of an escalation clause and simply recommended to Mr. Strnad that he discuss the matter with the contracting officer.

21. Another meeting between the parties was held on November 16, 1954, at which Mr. Strnad hand-delivered to the contracting officer a letter dated November 15, 1954. This lengthy letter reviewed the prior negotiations and reiterated Evans' contention that, in generally accepted business terminology, the phrase "terms and conditions" used

in its letter of September 1, 1954, did not include price. Mr. Strnad argued that it was unfair and contrary to the spirit of the set-aside regulations for the Government to set a lower production rate than that contained in the Aircraftsmen contract without making an upward adjustment in the price so as to compensate Evans for its longer exposure to possible increases in material prices. Nonetheless, he stated that if the conditions imposed by the Government were mandatory and not susceptible to revision, Evans would accept them in the interest of providing work for the persons in its critically distressed labor area.

However, the letter went on to request "that the highest authority and office review and submit a decision" on three alternative proposals: (1) that Evans be allowed a price in excess of $76.036 for performance at the reduced production rate of 3,000 bombs per month, or (2) that the contract include an escalation clause for specified purchased material limited to variations in excess of 2 percent up or down from market costs as of the date of the contract award to Aircraftsmen, or (3) that the contract include a similar escalation clause limited to aluminum which was the principal metal used in the manufacture of the bombs and the cost of which was the "least controllable."

22. By letter dated November 18, 1954, the contracting officer responded to the aforesaid letter as follows:

* * * * *

> With reference to your analysis on the first four pages of your letter, you have been orally advised of our opinion and the areas of disagreement. Without agreeing to any of your detailed interpretations, we are agreeable to continue negotiations for a quantity of approximately 71,000 Bombs, at the rate of 3,000 per month, at a firm fixed price, without any con-

tingencies, at a price not in excess of $76.036 each, subject to the conditions for surplus areas.

With reference to your request that a decision be furnished your company from the highest authority and office, regarding the three propositions contained on page 5 of said letter of 15 November 1954, for separate consideration, the Contracting Officer has determined that these items are within his scope of authority, and determines as follows:

That the maximum unit price for which the basic contract can be awarded cannot exceed $76.036 each;

That in accordance with the laws and regulations setting forth procurement for a set-aside quantity, the Contracting Officer is without authority to permit an escalation clause which, when adding the amount of the escalation to the base price, could raise the final price beyond that awarded in the advertised contract.

For your information, a copy of this letter, together with a copy of your letter of 15 November 1954, has been forwarded to higher authority, advising them of the action taken by this office.

Agreement on the Basic Contract and Negotiation of Changes

23. In a letter to the contracting officer dated November 20, 1954, Evans proposed a delivery schedule, submitted a revised performance guarantee by Lempco, and listed the mutually agreeable ground rules for negotiation as heretofore set forth in finding 18. In a response dated November 23, 1954, the contracting officer agreed to the proposed delivery schedule, approved the revised performance guarantee by Lempco, and set forth his understanding of what the parties had agreed should be the basic contract between Evans and the Government as follows: (1) that the basic contract should conform to the contents of the Invitation for Bids and of the contract awarded to Aircraftsmen except that (a) the price would be $76.036 per bomb F.O.B. Origin for 71,661 bombs, (b)

that beginning with August 1955 (after the pilot lot and initial deliveries in June and July) the delivery rate would be 3,000 bombs per month until completion of the contract, (c) that "Examination of Records" and "Labor Surplus Area" clauses would be inserted in the basic Evans contract; (2) that any contract negotiated with Evans had to be approved by higher authority before formal execution by the Procurement District; and (3) that if Evans agreed to the foregoing principles for the basic contract, the "technical changes" made subsequent to the contract award to Aircraftsmen would thereafter be forwarded to Evans for its evaluation.

By a registered letter dated November 30, 1954, Evans advised the contracting officer that it was in agreement with his statement of the basic contract principles and requested him to expedite the submission to Evans of the changes subsequently made in the Aircraftsmen's contract. Shortly thereafter, i.e., on December 3, 1954, the contracting officer wrote Evans that its understanding of the status of the negotiations as set forth in its letter of November 30, 1954 appeared generally correct. He stated that the drawings and specifications showing the changes theretofore made by the Government in the fire bomb were being forwarded under separate cover for Evans' detailed evaluation of the cost effect of each change and requested Evans to supply cost evaluations on or before Monday, December 13, 1954.

24. During the period extending from December 3, 1954 to Monday, January 24, 1955, representatives of Evans and of the Procurement District carried on written and oral negotiations with respect to the effect on costs of the several changes which the Government had made in the designs and specifications for the fire bomb and its container. In a letter to Evans dated January 17, 1955, the

contracting officer stated his understanding as to the current status of the negotiations and explained the method used by the Government in arriving at its proposed increase in unit price from $76.036 to $81.00. He granted Evans' oral request of January 11, 1955 for additional time to review its estimates in the light of these negotiations but insisted that final negotiations must take place on or before January 25, 1955.

25. The final negotiations between the parties took place in a series of conferences in New York City during the last week of January 1955.[6] At this time, Mr. Strnad made another effort to induce the contracting officer to agree that an aluminum price escalation clause should be included in the contract. Once again the contracting officer reiterated his position that legally he could not, and therefore would not, agree to the inclusion of such escalation clause.[7] Mr. Strnad did not press the matter further, and these meetings ended with the parties in apparent

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[6] There is a conflict in the testimony as to the exact dates of these conferences. To the best recollection of Evans' representatives, there were meetings on January 25, 26, 27, and 28. The Government's representatives, on the other hand, could recall meetings only on January 25 and 26. Evans' representatives also testified that at a conference on the morning of January 28, the contracting officer suddenly lost his temper and insisted that Mr. Strnad must show his good faith by then and there signing an incomplete contractual document which the contracting officer presented to him. Mr. Strnad testified that he did sign the document in the belief that if he refused to do so, the contracting officer would immediately discontinue negotiations. The contracting officer and other Government representatives denied that any such occurrence took place. None of the correspondence or interoffice memoranda contained in this record makes any reference to such an abortive document. Irrespective of whose recollection of the matter is correct, since nothing came of it, there is no reason to resolve the conflict. It is treated as irrelevant to the issues here.

[7] In his testimony at the trial, the contracting officer stated that, even if he had legal authority to agree to the inclusion of an aluminum price escalation clause, his negotiating position was such that he would have refused to do so.

agreement on all phases of the contract, including that of a price increase amounting to $5.844 per bomb covering the increase in costs attributable to changes made in the bomb and container since the Aircraftsmen award. Thus, the total unit price finally agreed upon was $81.88.

Thereupon, the Legal Division of the Procurement District prepared the basic contract together with Supplemental Agreement No. 1 reflecting the $5.844 price increase, mimeographed copies of which were forwarded to Evans under cover of the contracting officer's letter dated January 28, 1955, which read, in pertinent part, as follows:

> Attached hereto are three copies of Contract No. DA 30-070-CML-650, NY 5-128, and Supplemental Agreement No. 1 thereto, which have been prepared in accordance with our negotiations.
>
> * * * * *
>
> * * * it is now necessary that you expedite the execution and return of the documents, and it is requested that you do so on or before February 4, 1955.
>
> * * * * *
>
> Your request for the inclusion of a Price Escalation clause for the entire contract, or for that portion dealing with deliveries after the first year of operations, was given careful consideration, and as explained to you in our meetings of January 25th and 26th, the Contracting Officer has determined that this type of clause will not be included, and it is therefore not included in the contract.
>
> * * * * *
>
> You will note from an examination of the instruments that the basic agreement is for a unit price of $76.036, which sum is within the price allowed by law; that is, not in excess of the awarded advertised contract for the same item. The changes in specifications issued after the award of Invitation for Bid No.

CML 30-070-54-188, which have been incorporated into the contract by Supplemental Agreement No. 1, increase the unit price by the sum of $5.844 each, making a new overall unit price of $81.88.

It is requested that you execute all three (3) copies of the basic instrument and the Supplemental Agreement simultaneously, and return all of the copies to this office for execution by the Contracting Officer. As soon as the award is approved by higher command, your copy * * * will be executed * * * and returned to you.

* * * * *

26. On February 5, 1955, Evans executed the copies of the basic contract and supplemental agreement. They were forwarded to the contracting officer under cover of a transmittal letter dated February 4, 1955. The transmittal letter stated that Evans had executed the contract documents contingent upon acceptance by the Government of certain changes and modifications as set forth in the letter.[8] The contracting officer and his advisers were in general agreement with Evans' proposed changes and modifications subject, however, to certain further modifications of their own. Accordingly, the contracting officer caused the documents to be redrafted and mimeographed. He then forwarded the redrafted documents to Evans with a transmittal letter dated February 8, 1955, in which he set forth explanations of the changes made.

Evans executed the redrafted contracts and returned them to the contracting officer under cover of a letter dated February 11, 1955. In the transmittal letter, Evans again stated that its execution of the redrafted documents was contingent upon the Government's acceptance of certain minor modifications of no relevance here. Finally, by

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[8] These changes and modifications dealt with subjects having no pertinence to the dispute here involved.

letter dated February 23, 1955, Evans confirmed a telegram of even date accepting the Procurement District's request for insertion of an additional article in the basic contract and stated Evans' understanding that it would receive the contract in final form during the week of February 28.

27. By February 25, 1955, the office of the Deputy Chief of Staff for Logistics had approved the award of contract No. DA 30-070-CML-650 to Evans, and on that date the contracting officer executed the basic contract in behalf of the Government. Thereafter, on February 28, 1955, he also executed Supplemental Agreement No. 1 and immediately forwarded to Evans copies of both the basic contract and the supplemental agreement. At the same time, he forwarded to Evans "Change Order No. 2" which embodied all changes made to the bomb since the inception of negotiations for the supplemental agreement.

Production Difficulties Encountered by Aircraftsmen and Its Application for Relief

28. Meanwhile, Aircraftsmen in performing the non-set-aside portion of the fire bomb procurement had begun to feel the pinch of price increases in aluminum. It wrote a letter to the contracting officer on January 31, 1955. The letter referred to a telephone conversation of January 27 in which Aircraftsmen had briefly discussed its position with the contracting officer regarding aluminum price increases previously encountered by the company and advised that it had been subjected to two increases in the price of aluminum which could affect Aircraftsmen "disastrously" in its performance of its fire bomb contract. It, therefore, requested the inclusion of an aluminum price escalation clause in its contract. The letter closed with the request that the contracting officer forward the letter to "G-4" for consideration as soon as possible.

29. In a letter dated February 11, 1955, addressed to the Procurement Division, attention of the contracting officer, Aircraftsmen requested prompt consideration of, and action upon, "this formal application" for a progress payment program based upon receipt of materials. The letter referred to "unforeseen delays" occasioned by changes and Aircraftsmen's "lack of understanding" of the Government's requirements, and enclosed a financial statement showing that it had been unable to pay approximately two-thirds of the expenses which it had incurred in the performance of its contract.

At about this same time, the contracting officer had visited the Los Angeles plant of Aircraftsmen. During this visit it is probable that he discussed with Aircraftsmen's representatives their production difficulties and their desire for an aluminum price escalation clause. Also, during this visit, it is probable that the contracting officer became aware of a direct contact within the preceding 30 days between Aircraftsmen's personnel and Evans' personnel. Because of this, and because of the similarities in the language used by the two companies in their respective requests for aluminum price escalation clauses, the contracting officer became suspicious of possible collusion between them.[9] He reported the reasons for his suspicion to MATCOM by a memorandum dated February 15, 1955. It does not appear of record that MATCOM took any action on the contracting officer's request in his

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[9] To some extent his suspicions were aroused by the fact that representatives of both companies had asked, either orally or in writing, that their respective requests for aluminum price escalation be referred to "G-4." This was an obsolete World War II designation for the General Staff for Supply and Logistics which designation had not been in general use for a long time, and it seemed odd to the contracting officer that both companies were using the old designation during the same period of time unless they were collaborating and coordinating their efforts.

memorandum that the matter be forwarded to the proper channels for investigation.

30. On February 15, 1955, the contracting officer responded to Aircraftsmen's letter of January 31, 1955, requesting an aluminum price escalation clause. He inquired whether Aircraftsmen desired its request to be considered as a claim under Section 30, Part IV of the Army Procurement Procedure (APP) regulations and, if so, he suggested that Aircraftsmen should elaborate its claim on the appropriate forms, copies of which he offered to furnish.

By a letter marked "Air Mail" and dated February 23, 1955, Aircraftsmen advised the contracting officer that it did desire its request for an aluminum escalation clause to be treated as a claim under Section 30, Part IV of APP and attached thereto its application for relief with supporting documentation. The letter and its attachments were not received by the contracting officer until March 2, 1955. There is no satisfactory evidence in the record to explain the reason for the delay except the possibility that the documents might have been hand-carried to New York by Aircraftsmen's representatives who were conferring frequently with the contracting officer during this period of time.

31. Believing that he was without authority to act on Aircraftsmen's request for the discretionary relief authorized by Title II of the First War Powers Act (50 U. S. C. App. Sec. 611), the contracting officer forwarded it to MATCOM on March 15, 1955, together with his memorandum-indorsement recommending that the requested relief be denied "at this time" without prejudice to resubmission thereof following completion of the contract. On April 29, 1955, MATCOM denied Aircraftsmen's request because:

a. Contractor has not established any loss under this contract within the contemplation of APP 30-406.

b. The increases in the cost of aluminum alleged by contractor are such that normally should be taken into consideration by every bidder submitting a bid on a fixed-price contract.

32. After conferring with the company's attorney, Aircraftsmen's representatives decided to seek further consideration of their request for relief, and a letter to that effect was prepared on June 24, 1955, in which was incorporated "additional pertinent information." They hand-carried the letter to the Procurement District and presented it to the contracting officer in a personal conference on June 27, 1955. In the course of the conference, both the contracting officer and his attorney-adviser expressed the opinion that a resubmission of Aircraftsmen's claim on the same basis as the original submission had little chance of success at MATCOM. They suggested that Aircraftsmen should study all the pertinent regulations governing Title II relief in an effort to enlarge its claim so as to encompass possible alternative grounds for relief because, by this time, it seemed to the contracting officer that even the granting of an aluminum escalation clause to Aircraftsmen would be insufficient to overcome its overall problems. In keeping with this suggestion, on July 8, 1955 Aircraftsmen withdrew its letter of June 24, 1955. Its representatives thereupon began the preparation of an enlarged and more complete application for relief under Title II.

33. On August 12, 1955, Aircraftsmen resubmitted its Title II claim as amended and enlarged. The revised claim took the form of a lengthy letter to which were attached many exhibits, schedules, and financial statements. Among other things, the claim contained analyses

of mistakes, underestimations and miscalculations on the original bid by Aircraftsmen's prior management, further data and information on increased aluminum costs due to price increases, a statement regarding freight increases, computations showing the actual contract loss and future projected losses, and a lengthy discussion of the experimental nature of the fire bomb resulting in manifold production and testing problems. Two weeks later, Aircraftsmen's attorney supplemented the claim with a letter advising that present management was studying the feasibility of instituting litigation against the prior management for misrepresentation and that Aircraftsmen and its parent company would be willing to share with the Government a portion of the recovery, if any.

34. On September 6, 1955, the attorney-adviser for the contracting officer forwarded Aircraftsmen's Title II application to MATCOM together with his review and comments. On October 3, 1955, the contracting officer submitted a favorable preliminary recommendation certifying that Aircraftsmen's "financial distress was caused by a number of factors, namely: (a) an original underestimation of costs; (b) lack of extensive working capital to carry the contract of this magnitude during shutdown periods necessitated by change orders; and (c) failure to anticipate a rising market in a basic commodity."

Under date of October 17, 1955, a three-man board established in MATCOM to review applications for Title II relief recommended to the Chief Chemical Officer that Aircraftsmen be granted relief and found "that the actual and threatened loss on subject contract will impair the productive ability of the contractor, that his continued operation as a source of supply is essential to the National Defense effort, and that the National Defense effort will be facilitated by granting relief to the Contractor."

On October 24, 1955, the contracting officer forwarded to MATCOM an additional recommendation that, due to changes in shipping classification for the fire bombs, Aircraftsmen's contract be further revised without consideration flowing to the Government so that the 40,451 bombs to be delivered F.O.B. destination should be delivered F.O.B. origin. This recommendation met with the approval of MATCOM's special board.

35. After a hearing on October 25, 1955, the Army Contract Adjustment Board issued a decision dated October 28, 1955, containing the following findings:

* * * * *

a. That the completion of the performance of Contract No. DA-30-070-Cml-605 is essential to the national defense.

b. That because of losses sustained in the performance of Contract No. DA-30-070-Cml-605 the applicant will be unable to complete the performance of the contract unless it receives an increase in the contract price.

c. That an increase in the contract price to $87.9391 per unit, F.O.B. origin, for all units delivered and to be delivered, and modification of the contract to provide for delivery of all units F.O.B. origin will enable the applicant to complete the performance of Contract No. DA-30-070-Cml-605.

d. That the amendment authorized herein will facilitate the national defense.

* * * * *

Accordingly, the Chief Chemical Officer was authorized to amend the contract so as to increase the unit price retroactively from $76.036 to $87.9391, all deliveries to be F.O.B. origin. The Board took specific note of the fact that the new price of $87.9391 was "much less (over $7) than the estimated reprocurement price."

In February 1956, Aircraftsmen sought further Title II relief and asked the Army Contract Adjustment Board to authorize a further increase of the unit price per bomb to $95. The Board held a hearing on March 1, 1956, and issued a decision denying the requested further relief on March 23, 1956. The Board noted that its favorable action of October 28, 1955, was based on advice concerning the need for the fire bomb at that time. However, current advice to the Board indicated that the bomb procurement was no longer essential to the Air Force, and none of the Armed Services considered that either Aircraftsmen or its parent company were essential to them. Accordingly, the Board concluded that it could no longer make the required finding that the granting of relief must facilitate the national defense, and the application for relief was, therefore, denied. In that same month, an involuntary petition in bankruptcy was filed against Aircraftsmen. On March 26, 1956, the contracting officer terminated Aircraftsmen's contract for default in meeting the delivery schedule. Aircraftsmen was adjudicated a bankrupt on April 17, 1956. See *United States v. Chichester,* 312 F. 2d 275 (9th Cir., 1963).

Evans' Request for Title II Relief

36. By letter to the Procurement District dated October 12, 1956, Evans applied for relief under Title II, First War Powers Act, on account of an actual loss experienced in the production of 14,035 fire bombs through August 31, 1956, allegedly amounting to $191,543 plus a threatened loss in completing the contract estimated at $554,237. Evans asserted that its continued operation as a source of supply was essential to the national defense program and that the actual and threatened loss on this contract was of such magnitude as to cause the company financial

embarrassment and to impair significantly its productive ability. It complained that, in the negotiations for the set-aside portion of the procurement, it should not have been restricted to Aircraftsmen's bid price because of a different delivery schedule. The longer delivery period had resulted, it claimed, in Evans being subjected to a "phenomenal rate of increase in the price of aluminum." In addition, it argued that over 250 engineering changes had completely altered the design and specifications of the original bomb requiring substantial alterations in equipment, tooling, manufacturing processes and testing methods. It noted that, despite the Title II and other relief previously granted Aircraftsmen, that company had been unable to continue production and had been adjudicated a bankrupt, as had the only other producer of fire bombs. The application also argued that Evans' continued production was essential to the national defense and contended:

* * * * *

> * * * If at that time (October 1955) Aircraftsmen's production was deemed to be essential to the national defense, it certainly seems that Evans would be more so, in view of the fact that both Aircraftsmen and Diamond Building Products have been adjudicated bankrupts and their contracts terminated for default, leaving Evans the sole producer.

* * * * *

37. The Army Contract Adjustment Board held a hearing on June 18, 1957, with representatives of Evans and Lempco attending. Thereafter, on June 25, 1957, the Board issued its decision denying Evans' application. In its decision the Board noted that the Chief of Ordnance and the Chief Chemical Officer considered Evans and Lempco essential to the national defense and that the

actual and anticipated losses on the contract would impair their productive ability. However, the Board said that these decisions were based on conditions and financial data as of the time the application was filed in October 1956, and that at the hearing in June 1957, Evans' representatives had advised that, so far as they could determine at the end of March 1957, Evans had suffered no additional loss on the contract subsequent to August 31, 1956. The Board concluded:

> In view of all the circumstances of this matter, the Board found it necessary and proper to consider the combined resources of Evans Reamer & Machine Company and Lempco Products, Inc., in deciding whether the productive ability of the applicant is or will be substantially impaired. The latest financial statements of these companies, made available to the Board by the applicant, were as of 31 August 1956 for Evans Reamer & Machine Company and as of 31 December 1956 for Lempco Products, Inc. After considering these statements and all the other matter presented, the Board was unable to find that the current productive capacity of the two companies, Evans Reamer & Machine Company and Lempco Products, Inc., has been or will be substantially impaired. In view of this the application is denied. * * *.
>
> * * * * *

In the event circumstances should change significantly, the Board invited resubmission of the application.

38. On December 11, 1957, Evans asked the Board to reconsider its decision and asserted an alternative ground for relief on the theory of a mutual mistake of fact. In a memorandum dated January 27, 1958, the contracting officer denied that there had been any mutual mistake of fact during the negotiations with Evans and recommended that its request for reconsideration be denied. The con-

tracting officer claimed that Evans' representatives were aware of his personal opinion that Evans stood to lose nearly $500,000 on the contract.[10] Nonetheless, he asserted, they continued to insist on an award preferring to rely upon their own cost estimates rather than those of the Government. Concluding that the contract was not entered into as a result of any mutual mistake of fact, the Board denied the request for reconsideration on March 25, 1958.

39. Evans completed the contract by manufacturing and delivering the final portion of the 71,661 fire bombs during March 1958. It has not been paid for 70 fire bombs delivered under the contract and as yet has not submitted an invoice for final payment. However, it has informed the Government that it has no intention of abandoning its claim therefor. Evans does not ask the court in this proceeding to enter any judgment in its favor with respect to said 70 fire bombs for which no payment has yet been made.

Ultimate Findings of Fact

40. Upon the record as a whole, it is found that when plaintiff and defendant entered into the contract here involved, there existed no mutual mistake by the parties as to any relevant fact.

41. It is further found upon the record as a whole, that no act, or failure to act, by the defendant's contracting officer during the contract negotiations constituted fraud, actual or constructive.

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[10] Mr. Strnad testified at the trial in this court that he believed it was the general opinion of everyone, including the contracting officer, that $76.036 was "a very tough price" at which a contractor "might lose a little money."

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and its petition is dismissed.

Appendix

The following excerpts from statutes and regulations are pertinent to the issues here involved and are reproduced in this Appendix for purposes of convenient reference:

1. Title II of the First War Powers Act (50 U.S.C., App. 611 (1952 ed.)): § 611—War contracts exempt from certain restrictions upon authorization by President.

> The President may authorize any department or agency of the Government exercising functions in connection with the national defense, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendemnt, or modification of contracts whenever he deems such action would facilitate the national defense: * * * [1]

2. Section 644 of the Department of Defense Appropriation Act of 1954, Public Law 179 (August 1, 1953), 67 Stat. 357, and Section 733 of the Department of Defense Appropriation Act of 1955, Public Law 458, (June 30, 1954), 68 Stat. 356, read in pertinent part as follows:

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[1] The First War Powers Act of 1941 utilized the phrase "facilitate the prosecution of the war," 55 Stat. 839. During the Korean War this was changed to "facilitate the national defense," Act of January 12, 1951, 64 Stat. 1257.

* * * That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations.

3. Defense Manpower Policy No. 4, Office of Defense Mobilization (17 Fed. Reg. 1195, as amended) reads in pertinent part as follows:

I. *Introduction.*—* * * A primary aim of Federal manpower policy is to encourage full utilization of existing production facilities and workers in preference to creating new plants or moving workers, thus assisting to maintain economic balance and employment stability.

* * * * *

II. *Purpose.*—It is the purpose of this Defense Manpower Policy No. 4 to direct attention to the potentialities of areas of substantial labor surplus, hereafter referred to as labor surplus areas, for the placement of procurement contracts or the location of new plants or facilities, and to assign responsibilities to specified departments and agencies of the Government to carry out the policy stated below.

III. *Policy.*—It is the policy of the Federal Government to encourage the placing of contracts and facilities in areas of current or imminent labor surplus, * * *

IV. *Implementation.*—By virtue of the authority vested in me by Executive Order 10480 * * * and to carry out the purpose and policy objectives set forth above, the following assignments of responsibilities are made to the specified departments and agencies of the Government.

A. The Department of Labor shall:

1. Classify areas having a current or imminent substantial surplus of labor, under standards to be established by the Secretary of Labor.

* * * * *

B. All procurement agencies shall:

1. Use their best efforts to award negotiated procurement contracts to contractors located within labor surplus areas to the extent that procurement objectives will permit; provided, that in no case will price differentials be paid for the purpose of carrying out this policy.

2. Where deemed appropriate, set aside portions of procurements for negotiation, at prices no higher than those paid on the balance of these procurements, exclusively with firms located in classified labor surplus areas; provided that a substantial proportion of the production on these contracts will be performed within labor surplus areas;

* * * * *

ASPR 1-302.4. * * *

(b) *Policy.* Defense Manpower Policy No. 4 (revised 5 November 1953), issued by the Director of Defense Mobilization, directs the placement of supply contracts, at prices no higher than might otherwise be obtainable elsewhere, with such suppliers as will perform contracts substantially in current labor surplus areas. Accordingly, the Departments shall comply with the following:

(i) Use their best efforts to award negotiated procurements to contractors located within labor surplus areas for performance substantially within such labor surplus areas to the extent that procurement objectives will permit; *provided,* that in no case shall price differentials be paid for the purpose of carrying out of this policy.

(ii) Where deemed appropriate, set aside portions of procurements for negotiation exclusively with firms located in labor surplus areas at prices no higher than those paid on the non-set-aside portion; *provided,* that performance shall be substantially within labor surplus areas.

* * * * *

ASPR 2-205.2. *Determination of the Quantity of "Set-Aside."* When the use of "set-asides" is deemed appropriate, procuring activities shall determine the optimum quantity which would probably result in the most favorable price, considering the manufacturing processes involved and the quantity required for an economical production run. Invitations for bids shall be issued for not less than such optimum quantity. The resulting "set-aside" shall also not be less than such optimum quantity. After award of the quantity not set aside, procurement of the "set-aside" shall be effected by negotiation pursuant to ASPR 3-219.

* * * * *

ASPR 3-219.2. *Limitation.* Pursuant to Section 644 of the Department of Defense Appropriation Act of 1954 (Public Law 179, 83d Congress), and any subsequent similar statutory limitations, no price differentials shall be paid for the purpose of aiding labor surplus areas.

ASPR 3-219.3. *Eligible Bidders and Offerors.* Negotiation for "set-asides" shall be conducted only with such responsible bidders or offerors which have previously submitted bids or proposals on the quantities not set aside conforming to the Invitation for Bids or Request for Proposals, providing such bids or initial proposals offered a unit price within 120 per cent of the highest award made on the quantities not set aside, and provided further that contracts for such "set-asides" will be performed substantially in labor surplus areas.

ASPR 3-219.4. *Method of Negotiation.* * * *

* * * * *

(c) In conducting negotiations for the "set-aside," it is permissible to reveal the unit price of the lowest award; however, in instances where the non-set-aside portion is procured by means of negotiation,

cost or other pricing data pertaining to such award may not be divulged.

ASPR 3-219.5. *Limitations on Contract Price.*

(a) When the procurement of quantities not set aside has resulted in one contract only, or in multiple awards all at the same price, awards for "set-asides" shall not exceed the contract price for the quantities not set aside.

(b) When the procurement of the quantities not set aside has resulted in multiple awards at different contract prices, awards for "set-asides" shall be at a price determined by the Contracting Officer to be fair and reasonable, but in no event higher than the highest price awarded in connection with the quantities not set aside. * * *

* * * * *

APP 30-403.2. *To Army Contract Adjustment Board.* The following authority has been delegated to the Army Contract Adjustment Board, heretofore established in the Office of the Under Secretary of the Army;

a. To approve all requests for amendments of contracts without consideration.

b. To approve correction of all mistakes in contracts.

* * * * *

APP 30-404. *General Considerations.*

a. The authority granted herein is an extraordinary one and its exercise must be carefully administered. * * *

* * * * *

d. At all events, no action under the above-described authority should be taken or recommended to higher authority unless the officer or official required to take such action or make such recommenda-

tion is firmly and clearly convinced that the action is necessarily and urgently required to facilitate the national defense.

* * * * *

STATUTES AND REGULATIONS.

Title II of the First War Powers Act (50 U.S.C., App. 611): § 611—War contracts exempt from certain restrictions upon authorization by President.

The President may authorize any department or agency of the Government exercising functions in connection with the national defense, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the national defense: * * *

PROCUREMENT REGULATIONS.

ASPR 1-302.4, 32 CFR 1.302-4 (1954).

(b) *Policy.* Defense Manpower Policy No. 4 (revised 5 November 1953), issued by the Director of Defense Mobilization, directs the placement of supply contracts, at prices no higher than might otherwise be obtainable elsewhere, with such suppliers as will perform contracts substantially in current labor surplus areas. Accordingly, the Departments shall comply with the following:

(i) Use their best efforts to award negotiated procurements to contractors located within labor surplus areas for performance substantially within such labor

surplus areas to the extent that procurement objectives will permit; *provided*; that in no case shall price differentials be paid for the purpose of carrying out this policy.

(ii) Where deemed appropriate, set aside portions of procurements for negotiation exclusively with firms located in labor surplus areas at prices no higher than those paid on the non-set-aside portion; *provided*, that performance shall be substantially within labor surplus areas.

ASPR 3-219.4(c), 32 CFR 3.219-4(c) (1954).

(c) In conducting negotiations for the "set-aside," it is permissible to reveal the unit price of the lowest award; however, in instances where the non-set-aside portion is procured by means of negotiation, cost or other pricing data pertaining to such award may not be divulged.

ASPR 3-219.5(a), 32 CFR 3.219.5(a) (1954).

§ 3.219-5 Limitations on contract price. (a) When the procurement of quantities not set aside has resulted in one contract only, or in multiple awards all at the same price, awards for "set-asides" shall not exceed the contract price for the quantities not set aside.

ASPR 1-802, 32 CFR 1.802 (1967).

1-802 General Policy. Except as provided in 1-806 with respect to depressed industries, it is the policy of the Department of Defense to aid labor surplus areas by placing contracts with the labor surplus area concerns, to the extent consistent with procurement objectives and *where such contracts can be awarded at prices no higher than those obtainable from other concerns, and by encouraging*

prime contractors to place subcontracts with concerns which will perform substantially in labor surplus areas. In carrying out this policy, to accommodate the small business policies of Section I, Part 7, preference shall be given in the following order of priority to (i) persistent labor surplus area concerns which are also small business concerns, (ii) other persistent labor surplus area concerns, (iii) substantial labor surplus area concerns which are also small business concerns, (iv) other substantial labor surplus area concerns and (v) small business concerns which are not labor surplus area concerns. But in no case will price differentials be paid for the purpose of carrying out this policy. Heads of Procuring Activities and Heads of Field Purchasing and Contract Administration Activities are responsible for the effective implementation of the Labor Surplus Area Program within their respective activities. Responsibility for administration of the program may be assigned to small business specialists appointed pursuant to 1-704.3. (Emphasis added.)

ASPR 1-803(a)(i), 32 CFR 1.803(a)(1) (1967).

1-803 Application of Policy.

(a) Within the policy set forth in 1-802, the following shall be applied to procurements which are estimated to exceed $10,000 and may, if deemed practicable by the contracting officer, be applied to procurements between $2,500 and $10,000:

(i) negotiated procurements shall, where procurement objectives permit, be awarded to labor surplus area concerns; provided, that in no case shall price differentials be paid for the purpose of carrying out this policy;

APP 30-404. General Considerations.

a. The authority granted herein is an extraordinary one and its exercise must be carefully administered. * * *

d. At all events, no action under the above-described authority should be taken or recommended to higher authority unless the officer or official required to take such action or make such recommendation is firmly and clearly convinced that the action is necessarily and urgently required to facilitate the national defense.

COURT OF CLAIMS RULES.

52(b).

(b) Responsibility: In all cases referred to him, the commissioner shall be responsible in the first instance: (1) for all orders requisite to the joinder of issue on the pleadings; (2) for disposition of procedural motions; (3) for the direction and conduct of pretrial proceedings (including calls, discovery, admissions, and depositions); (4) for the trial of issues of fact; (5) for making and reporting findings of fact; and (6) if so directed by the court, for submitting his recommendation for conclusions of law. A commissioner may not issue any order that is dispositive of a case; nor may he cite for contempt.

53(a).

Rule 53. Reference of Cases to Commissioners.

(a) Purpose of Reference: Unless otherwise ordered by the court, every case commenced in the Court of Claims shall be referred to a commissioner for action pursuant to the provisions of Rule 52(b).

57(a).

Rule 57. Commissioner's Report.

(a) Content; Findings of Fact; Conclusions of Law: In every case involving controverted issues of fact, the commissioner shall ascertain the facts from the evidence and file with the clerk a report of his findings, which report shall constitute a part of the record. In any such case wherein it appears to the court that the commissioner's recommendation for conclusions of law would expedite the disposition of the case, the court may direct him to include such recommendation in his report.

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No. 1097

In the Supreme Court of the United States

OCTOBER TERM, 1967

EVANS REAMER & MACHINE COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We respectfully invite the attention of the Court to the following facts which demonstrate that the petition was filed out of time:

On November 9, 1967, the Court of Claims determined that petitioner was not entitled to recover from the United States for an alleged breach of contract and entered an order dismissing petitioner's petition (Pet. App. 1a). The petition for a writ of certiorari was filed 92 days thereafter, on February 9, 1968.[1]

[1] Petitioner did not seek reconsideration in the Court of Claims or obtain an extension of the time within which to file its petition for a writ of certiorari.

291-607—68

Section 2101(c) of Title 28 provides that "any writ of certiorari intended to bring any judgment or decree in a civil action * * * before the Supreme Court for review shall be taken or applied for within ninety days after the entry of said judgment or decree." Since these limits are jurisdictional, the petition should be dismissed as untimely.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1968.

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Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

REPLY TO RESPONDENT'S MEMORANDUM.

RICHARD F. STEVENS,
1950 Union Commerce Building,
Cleveland, Ohio,
Attorney for Petitioner.

Of Counsel:
VICTOR STRIMBU, JR.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

REPLY TO RESPONDENT'S MEMORANDUM.

Petitioner's Application for a Writ of Certiorari was filed ninety-two (92) days after the entry of the decree of the Court of Claims. The late filing was caused by an error in the computation of the time period within which a petition for a writ of certiorari should be filed.

The Petitioner respectfully requests that its application for a writ of certiorari not be summarily denied but rather considered on its merits. Petitioner submits that this Court can consider the Petition on its merits if it chooses to do so.

Prior to September 1, 1948, Title 28, U. S. C. § 350 (c) provided as follows:

> "No appeal, or writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be *allowed or entertained* unless application therefor be duly made within three

> months after the entry of such judgment or decree excepting that writ of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding 60 days by a justice of the Supreme Court." (Emphasis added.)

Section 2101(c) of Title 28, effective September 1, 1948, provides:

> "Any other appeal or any written certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days."

It is, of course, apparent that Congress deleted the express prohibition against allowing or entertaining an application for a writ unless it was filed within the designated time period. Congress did not delete the sentence which gives a Justice of the Supreme Court the right to extend the time for applying for a writ of certiorari for a period not exceeding sixty (60) days. Congress, in deleting the express prohibition against allowing or entertaining a petition for a writ of certiorari filed after the designated time period has expired, has left the question of whether such a petition should be allowed or entertained to the discretion of this Court.

Admittedly, Petitioner has filed its application two (2) days late. However, the record in this case was in the Supreme Court well before the time period had expired. Respondent was aware that Petitioner had taken the first steps toward applying for a writ of certiorari

within the time period allotted, and the late filing of the Petition has caused no delay in the Supreme Court's consideration of this case. To summarily dismiss Petitioner's application without considering it on its merits as Respondent has requested is not required by law. When weighing the impact of summary dismissal of Petitioner's application against the fact that consideration of said application on its merits will cause no inconvenience to the Court or to Respondent, Petitioner submits that, in light of the substantial questions of law raised in said application, the application should be considered on its merits. Petitioner, in effect, is requesting the Court to exercise the discretion granted it by Congress and to allow Petitioner a two (2) day extension of time for the filing of its application so that the Petition may be considered on its merits.

Respondent's Memorandum in Opposition correctly points out Petitioner's late filing, but then requests that the Petition be dismissed. Rule 24(2) of the Rules of the Supreme Court states that no motion by a respondent to dismiss a petition for a writ of certiorari will be received.

Petitioner respectfully requests that Respondent's request for dismissal of Petitioner's application for a writ of certiorari be denied and that this Court consider said application on its merits.

Respectfully submitted,

RICHARD F. STEVENS,
Attorney for Petitioner.

Of Counsel:
VICTOR STRIMBU, JR.